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DESIGN FOR GOVERNMENT[1]

THERE is no prearranged field of government which is set apart from the circumstances of those who are governed. Relations here are always interdependent. As the circumstances of the people change, functions of government change. These are trite declarations of principle; I believe they are properly reiterated, however, for they are significant when one undertakes an appraisal of the legal and economic commitments of the new Administration. It is a truism, too, to say that what is done by each of its divisions is affected by the whole orientation of the state. Like most truisms, this one contains a kernel of vital truth; it means, as respects ourselves, that executive, legislative and judicial functions are not unalterably fixed, but are subject to revision. Government, or any part of it, is not in itself something; it is for something. It must do what we expect of it or it must be changed so that it will.

This is true of all institutions. Only the unsound theorist counts upon a static world; he does so, I suspect, in order that his literary generalities may more accurately describe reality. Such theorists, however (and they include many a hard-boiled business man), do not merely prefer to inhabit an unreal, static world; they also accumulate resistance, not always happily, to the recognition of change and the necessities for it. They are, therefore, always ready with criticism because they have a prepared basis for it. It is easy for them to attack any express plans which threaten to create a world which is different from

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their concept of it. It is this sort of criticism which, since it possesses prestige and emotional content, is in the end most dangerous. It seems to me important, for this reason, to begin the building, even somewhat prematurely perhaps, of the rationale of recent emergency action.

Upon general social and economic problems, upon fit relations of government to industry, upon the respective functions of the several divisions of government in connection with these relationships, it is the line of least resistance for most of us to affect the attitude of the theorist. And this is true whether or not the consequences appear to be promising for or threatening to our social and economic existence. It is merely a usual process of thought. Our loyalties and affections are apt to attach themselves to instruments rather than to functions. In this instance we are apt to regard a form or a document more highly than the values such a thing produces. We become adulating and uncritical. Only crisis calls in question our attribution of virtues. We then see suddenly that values attach to these things because they are valuable and not because they simply exist.

The new Administration is compelled to reckon with these attitudes of people. In this connection I shall refer to and shall dwell upon two major lines of action which have been taken. I shall attempt to evaluate their constitutional and economic validity; I shall attempt to sustain them against more orthodox theories of government, law and economics. What I can say here and now must be merely the sketch for something which ought to have been longer considered, made more revealing by the inclusion of ramifying implications. There has not been time yet for that. If, however, I can furnish some clues to the rebuilding of a theoretical structure, I may have done something toward closing the gap between theory and reality. There will be sufficient ingenuity, and above all, adequate time, for other minds to follow these directions.

The two major lines of action of the Administration to which I refer are, first, measures, such as the National Recovery Act and the Agricultural Adjustment Act, to coördinate and control private enterprise; and, second, measures

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vesting powers for the execution of laws in the Executive. Is it legally proper, if it is economically wise, for the national government to assume the leadership of private enterprise; to regulate terms and conditions of employment, including wages; to prescribe permissible trade practices; even, if need be, to interfere with prices? Since these measures are related to the control of interstate and foreign commerce, attacks upon their constitutional validity must be upon broader grounds than that they violate theories concerning the powers of the Federal and state governments. The doctrinal antagonism is broader than this; in terms of unconstitutionality, the economic theory of "free competition" is employed to attack these measures, this "governmental interference", as we call it. The Constitution is used as a holy of holies within which the ugly practices of free competition can be hid from vulgar eyes.

May I briefly analyze the economic implications of our past competitive economy and prophesy its position under the new measures?

As a matter of early national history, we may admit that unrestrained competition may have been a useful economic creed. Originally, it described our attitudes toward producers, especially producers who wrenched economic goods from sources of natural supply. Nature offered sufficient resistance to the ill-equipped producer to keep the market undersupplied. The problem of overproduction did not exist. The ruthless creed of free competition was appropriate enough to the task of conquering the continent which necessarily was our great preoccupation during the nineteenth century.

Past circumstances produced needs (or supposed needs) which yielded theories in support of them. Toughest of those theories—so tough that in the thinking of most men it became an unalterable fact—was that which made competition a vital necessity, an end-in-itself, to be preserved at all costs. Competition was assumed to be an inherent part of democracy. Indeed competition and democracy came to be thought of as two aspects of one and the same value: A non-competitive world was an undemocratic world.

Some two decades ago, it began to be apparent—or should

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have been—that competition and democracy were not Siamese twins, that they were separable, that, in fact, the separation had to be carried out if democracy were not to be stifled by competition. Woodrow Wilson evidenced an awareness of this problem in a certain address before the American Bar Association in 1910. But public espousal of this cause was unpopular. In that year the governing technique of industry had not yet been recognized; scientific management had not even been named. It was impossible to foresee the revolutionary impact of those productive forces which were then gathering strength upon every institution which it was expected to maintain in the same world. The monster of industry was not yet so pervasive that it could not be ignored. And traditional theory could yet hold its place for a while. Nevertheless, with matters economic developing as they were, the adherence to this policy, expressed in the several anti-trust laws, meant that government was pitting itself against inevitable, unconquerable industrial forces.

Competition, to depart from which was made unlawful, became a matter of legal compulsion. It meant compelled business confusion. Coöperative impulses, demanded by the current economic trend, were thwarted and repulsed. They expressed themselves only indirectly and unhealthily. What was sound and economically necessary was branded as wrong legally. The negatory powers of government were just strong enough to frustrate the creative zeal which the situation required. The reason for our insistence in those years on legislation to compel conflict was that conflict was naturally disappearing. Its passing was regarded as a catastrophe. The industry whose contours began to be revealed was unorthodox; no one knew what it would be like and therefore it ought not to be allowed to be born. But it was born even though it had to lead a subterranean existence until within a matter of months. And it grew almost as lustily as though it had been nourished with care rather than treated as a pariah. It preyed on its oppressors, however, and so had its own revenge. Its successive victimizations of society became more and more violent until at last there seemed no more possibility of pre-

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tense and concealment. It is now out in the open; and the hope is that its nature may be tamed to the uses of civilized existence.

But I must insist that our circumstances have changed. The plowman no longer homeward plods his weary way; he rides a tractor. Natural resources can no longer resist, with the same effectiveness, our instrumentalities for their exploitation. Our economic course has carried us from the era of economic *development* to an era which confronts us with the necessity for economic *maintenance*. In this period of *maintenance*, there is no scarcity of production. There is, in fact, a present capacity for more production than is consumable, at least under a system which shortens purchasing power while it is lengthening capacity to produce. In this period of *maintenance*, the fact, and it is a fact, of dependence of all production upon a monetary market, vitalizes not only problems of transportation, distribution and exchange but also the fact of indispensable coördination of these factors of our economy. Even more, this dependence of our total economic life upon the market makes more and more conspicuous the dependence of our economic existence upon the purchasing power of the consumer—upon wages, that is, and protected prices.

This era of *maintenance* is the era of our present and future existence. The inextricable interdependence of its multiple factors demands a new control, a control designed to conserve their ability to function, a control to conserve and maintain our economic existence. As the government "interfered", in days of free-competitive exploitation, with bonuses for production, tariffs, grants of natural resources, Anti-Trust Acts, and prescriptions for raising two blades of grass where only one grew before, I have felt that the government must now intervene in other ways to conserve and maintain the industrial system which was developed here. It is a governmental function, not only because this conservation is a matter of public interest, but also because enterprises cannot act collectively for preservation. This paradox is explicable only by reference to the survival of certain competitive licenses when others have been brought under control. Enterprisers are unable to agree by

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themselves to act coöperatively because of gains which recalcitrant minorities are continually tempted to extort from any great endeavors of this sort. Beyond this there is the final suicide compulsion which afflicts free industry. It throttles itself by closing off its access to markets. Only a socialized industry can market its goods continuously because, until it is socialized, it cannot join in the protection of demand.

Must we believe that Mr. Roosevelt's measures are contrary to the "American Way", contrary to the public welfare, contrary to the Constitution, when they are measures designed to eliminate the anarchy of the competitive system, to ameliorate the recurrence of our spirals of inflation and deflation? Is his "partnership with industry" so contrary to the spirit of our institutions that it must be forbidden?

This is not an unknown phenomenon in economics. We once had iron laws of wages which we buttressed with the Malthusian notion that war, famine and pestilence were the natural controls over standards of living. No one believes that any more about population. Shall we continue to believe that panics, deflation and bankruptcy are our only remedies for overproductivity in industry? Or shall we, by similar ingenuity, control overcapacity and reconstruct the purchasing power of our people? The Malthusian theory did not prevent the one; I doubt if the theory of free competition will prevent the other.

Let me summarize: In this era of our economic existence, I believe it is manifest that a public interest well within the functions of government and well within the authority of government under our Constitution, commands the protection, the maintenance, the conservation of our industrial faculties against the destructive forces of unrestrained competition. And certainly, the Constitution was never designed to impose upon one era the obsolete economic dogma which may have been glorified under it in an earlier one. Today and for tomorrow our problem is that of our national economic maintenance for the public welfare by governmental intervention—any theory of government, law or economics to the contrary not-

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withstanding; hence the National Recovery Act and the Agricultural Adjustment Act of the Administration.

I shall now turn to a consideration of the measures enacted in the last special session of the Congress vesting in the President broad powers for the administration and execution of laws enacted by the Congress. Reference may be made, for illustrative purposes, to the powers granted to the President under the Economy Act and under the appendage to the Agricultural Act which is popularly known as the inflation amendment. Of what may even the theorist of government, law or economics complain? Has the theory of a republican form of government explicit in the Constitution been violated by the new Democratic President and Congress? Has the philosophy of "checks and balances" within the Federal government been infringed? These questions naturally arise; they command respect, for they concern our faith in the organization and functioning of our national government. But must faiths, political more than economic, be preserved at all events—that is, in disregard of the obviously necessary requirements of the public welfare? May our faith in "checks and balances" yield to necessity, or even to expediency? If these faiths and this necessity for more expeditious governmental action are to clash, must we sacrifice efficiency or shall we establish a new faith?

Let me briefly discuss what the lawyer would call the "merits of the case." The President presumably sought, in asking to be invested with broad permissible powers, to attain a maximum of efficiency in the execution and administration of the laws of the Congress. In view of the complex and multiple aspects of the situation which we then faced no single statute could be adequate; no series of statutes could be adequate. We had, remember, to repair disaster, imminent, pressing. The actions called for, if they were to be left to the traditional legislative and enforcement procedures, were manifestly not going to be in time and were likely not to be sufficiently drastic.

Let me pursue this thought a bit further. The traditional legislative process is highly spasmodic. Legislation of yesterday may be reconsidered today; it may be amended tomorrow

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and further altered or repealed thereafter. I might cite, for example, the history of our bankruptcy acts over the past century and a quarter, with which every lawyer is sufficiently familiar. In other words, the legislature can act and react only by the accumulation of one statute upon another — a process inherently inadequate to meet the necessities of immediate and exigent action on the many fronts of our battle for economic self-preservation. And of course, it is manifest that mere enactment of a statute, without subsequent executive action, is of little avail. And so the layman's fallacy that legislation becomes effective of its own force had to be disregarded. The subject matter dealt with made this fallacy doubly dangerous. The reform of banking practice or the elimination of racketeering from trade could not be assured merely by posting police. Indeed, the subject matter of the new legislation required little policing, but instead, much coördinated administration and negotiation. The senior partner in the firm just being formed would need to be something more than a benevolent uncle if order were to be established in an unruly and poverty-stricken household. Such were the necessities, the merits of the case, which confronted the President and the Congress.

To meet these demands for coördinated administration and negotiation looking to our economic resuscitation, the President has accepted the responsibilities which the Congress has vested in him. The laws of the new Administration are the laws of the Congress; it lies with the Congress to alter, amend, or repeal them. The President is to execute and administer them. Certainly, I submit, it is not patent wherein our Constitution has been violated, our republican form of government emasculated, or our philosophy of "checks and balances" for the Federal government infringed. Indeed, I strongly suspect that, for the most part, those who criticize these measures as being unconstitutional, dislike them either because of meager understanding or because of fear that some protected privilege will be exposed and abolished.

"Constitutionality" is talked about as if it were a tangible fact, undeviating and precise. The wiser lawyers of my

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acquaintance agree with me in recognizing the folly of such a notion. Constitutional law, at any given time, is the then current theory of what ought and what ought not to be done under the Constitution, a legalistic expression of the prevailing political and economic philosophy.

Thus viewed, the constitutional law of the latter part of the nineteenth century expressed itself not merely in the decisions and opinions of the United States Supreme Court, in legislative debates, in textbooks. It found definite articulation in legislation—notably in the Sherman Act and its family of anti-trust statutes. Significantly, in the recent Congressional discussions of the Administration's program, some of the elder statesmen frequently approached any proposal to abate the anti-trust laws as if that involved a constitutional change. In a profound sense they were correct; such a proposal did mean a change in the theory of the proper use of the powers conferred by that tersely worded paper called the Constitution.

And here let me say that it is my view that what we have done is to rediscover the Constitution, to revitalize the powers it was intended to create, many of which had been obscured in the interest of economic aims and purposes which have now become oppressively obsolescent. Those who wrote that great state paper were wise and bold. The best of them, although they disagreed on details, were struggling to meet a crisis which, in some important respects, was not unlike that now confronting us. They were fighting economic disorganization fostered by inadequate centralization. The Constitution, as you recall, was in effect, a *coup d'état;* it was adopted in contravention of the Articles of Confederation because the government set up by those Articles was too weak, too decentralized, to meet contemporary economic necessities.

The governmental pattern set up by the founding fathers was adapted from the British pattern but with notable modifications. Among them was the grant of wide powers to the Executive at a time when the powers of the Executive in England were declining. And that American set-up—a strong central government with a powerful executive — maintained itself for years, in spite of verbal protests from one political

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faction or another. Later, a variety of influences led to the rise of an opposed constitutional theory. And part of that new theory was an increased stress on the idea of checks and balances. That idea, in turn, was based on Montesquieu's false description of the workings of the English government. And Montesquieu's misdescription was, in the interest of this new theory, misdescribed and its errors magnified. It was as if an image in a defective mirror had been reflected in another defective mirror.

The resulting false image of a wise government became the controlling design for government in these United States. Governmental action was considered as, at best, a necessary evil. To check-and-balance government to a point just short of inaction was the desideratum. The prevailing constitutional theory, and therefore the constitutional law, of course, corresponded to this prevailing economic outlook.

At the center of this constitutional law was the conception of government as policeman. Government was to stop flagrant abuses, and no more. It should be negative and arresting, not positive and stimulating. Its rôle was minor and peripheral. It was important in this one sense: It was to prevent interferences with the competitive system. Behind that system (so it was said and thoroughly believed) was an invisible hand which beneficently guided warring business men to the promotion of the general welfare.

The jig is up. The cat is out of the bag. There is no invisible hand. There never was. If the depression has not taught us that, we are incapable of education. Time was when the anarchy of the competitive struggle was not too costly. Today it is tragically wasteful. It leads to disaster. We must now supply a real and visible guiding hand to do the task which that mythical, non-existent invisible agency was supposed to perform, but never did.

Men are, by impulse, predominantly coöperative. They have their competitive impulses, to be sure; but these are normally subordinate. Laissez-faire exalted the competitive and maimed the coöperative impulses. It deluded men with the false notion that the sum of many petty struggles was

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aggregate coöperation. Men were taught to believe that they were, paradoxically, advancing coöperation when they were defying it. That was a viciously false paradox. Of that, today, most of us are convinced and, as a consequence, the coöperative impulse is asserting itself openly and forcibly, no longer content to achieve its end obliquely and by stealth. We are openly and notoriously on the way to mutual endeavors.

And there is the importance of the rediscovery of the Constitution. We are turning our back on the policeman doctrine of government and recapturing the vision of a government equipped to fight and overcome the forces of economic disintegration. A strong government with an executive amply empowered by legislative delegation is the one way out of our dilemma, and forward to the realization of our vast social and economic possibilities.

I have spoken of the resurgence of the coöperative impulse. It has long struggled for more active expression. That struggle might have been unsuccessful. But it is our great good fortune that at the moment when the failure of that struggle would almost surely have meant total collapse, there came into the presidency a man deeply moved by the coöperative impulse. And, above all, it is our good luck that that man was one whose integrity is beyond question.

That point cannot be overemphasized. The success of the new spirit demanded a restoration of power to the Executive. The executive branch of the government is not a piece of mechanism, it is a body of men. If the new program is to succeed, those men must be wise, able, ingenious and honest. The shift to a new design for government would be a total failure if they were otherwise.

President Roosevelt is establishing, at this most critical period, an enduring pattern of administrative conduct. A lesser man, a self-aggrandizing, humorless one, a person less gifted with administrative talent and less eagerly hungry for wisdom, a dogmatizer without the experimental attitude, would merely have aroused false hopes which his accomplishments would have destroyed. The new design, with its unavoidable stress on vigorous governmental administration, possesses

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promise of endurance because it found precisely the right man. He is creating a lasting standard of administrative conduct below which none of his successors will dare to fall.

It is rather common these days to hear praise and criticism in one breath. The program is deplored because of its departures from tradition; the shaper and administrator of the program is praised because he embodies all those traits which we like to think of as American. But this is an antithesis which cannot be allowed. If praise is due for what he does, praise also is due for the program which permits the doing. The Executive is inseparable from his program — not any single part of it, but the total attempt to meet exigencies as, he has said, the football quarterback meets them, with power to do the expedient thing, to advance or to withdraw, creating strategy as the need for it appears.

There is nothing in all this which violates the spirit of our Constitution. As Mr. Justice Brandeis has said, "We do not need to amend the Constitution, we need to amend men's minds." And Mr. Justice Holmes, following in the footsteps of Marshall, has reminded us to remember always that it is a constitution with which we are dealing and that, "The Constitution was not designed to establish for all time any particular economic theory, whether of the organic relationship of the individual to the state or of laissez-faire." It is an experiment as all life is an experiment. We shall follow resolutely wherever the dictates of our minds propose. In the noble language of Mr. Justice Brandeis, "If we would guide by the light of reason, we must let our minds be bold."

REXFORD G. TUGWELL

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THE EARLY DEVELOPMENT OF THE LAW OF CONTRABAND OF WAR III *

IN the previous instalments of this article, the development of the law of contraband of war was traced through the seventeenth century. The following survey of the first half of the eighteenth century shows that the uncertainty and confusion attending this subject were not diminished.

Given the bases on which this law of contraband of war had progressed up to 1700, the subsequent development of this phase of the constant conflict between neutrals and belligerents presents as its most interesting characteristic the question what articles were deemed to be included in the contraband category. The dispute turns chiefly on the two main categories of foodstuffs or provisions ("*munitions de bouche*") and naval stores. We have also, however, some suggestions of the rule which has affected fundamentally the other half of the law of contraband of war, namely, the rule of "continuous voyage" as determining the destination of a cargo of goods which are contraband by nature.

The eighteenth century opens with a most unusual situation which had an important bearing upon the views of various governments on the question of neutral rights. Two wars were waged simultaneously but separately, so that belligerents in one struggle were neutrals in the other and *vice versa*. The wars were those of the Spanish Succession, in which Spain and France contended with England, Holland, Portugal and the Empire from 1702 to 1713, and the Northern War, in which Sweden fought against Russia, Denmark, Saxony, Poland and later Prussia, from 1700 to 1721.[172] As Professor Clark says, the coincidence and separation of these two wars

* The first two parts of this article were published in the POLITICAL SCIENCE QUARTERLY for December 1932, vol. XLVII, pp. 526-546, and for March 1933, vol. XLVIII, pp. 62-93.—ED.

[172] See Clark, "Neutral Commerce in the War of the Spanish Succession and the Treaty of Utrecht" [hereinafter cited, Clark, "Neutral Commerce"], 1928 *British Year Book of International Law*, pp. 69 *et seq.*

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had "the comic effect that the Powers which were neutrals in one war were belligerents in the other, so that the arguments used to justify their rights in relation to seaborne trade had to be framed to meet the unusual condition that those to whom they were addressed would be able to turn them against their authors in the simultaneous controversy in which the roles of belligerent and neutral were reversed." [173]

After the close of this war, there was an interlude of a dozen years before the outbreak of a two-years' contest on the part of France, Spain and Sardinia against Russia and Austria. In 1739 England began with Spain the War of Jenkins' Ear. In the next year commenced the War of the Austrian Succession in which eventually England, Austria, Sardinia and Hungary, and for a short time, the States General, were arrayed against France, Spain, Prussia and Bavaria. This conflict lasted eight years (counting the years 1744-48 during which it was known as King George's War).

In this half-century there was thus ample opportunity for the building up of additional rules and precedents in treaties, state papers and prize-court decisions.

In modern times, governments are reluctant to conclude even bipartite treaties which seem to sanction a principle to which they are opposed in general, even though they may be willing to accept a specific application of that principle.[174] In the eighteenth century, however, and especially with reference to neutral rights, the general attitude seems to have been that bipartite treaties were no reflection of the parties' views of the general rules of the laws of nations, but rather that they were frequently in derogation of that law.[175]

[173] *Ibid.*, p. 70.

[174] This attitude is particularly well exemplified in the British government's reluctance, in the negotiations with the United States for a liquor-smuggling treaty in 1922-23, to agree upon any provision which might weaken the force of the three-mile limit of territorial waters; see Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), pp. 279-289.

[175] *Cf.* the views of the leading British jurists in the famous report on the Silesian Loan: "Particular treaties too have inverted the rule of the law of nations" relative to free ships, free goods; "So likewise, by particular treaties, some goods reputed contraband by the law of nations are declared to be free." Marsden, *Law and Custom of the Sea* [Navy Record Society, vols. 49 and 50

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A few treaties were concluded during this period, although among the chief maritime powers the conventions of the late seventeenth century still applied.

In 1701 Denmark concluded a treaty with England and the States General [176] by which the agreements of 1690 and 1696 were confirmed; naval stores were thereby declared contraband. The same is true of the separate Danish-Dutch treaty of the same year.[177]

One might expect to find in the commercial treaty signed along with the treaty of peace at Utrecht in 1713, that England had compelled the French to accept the English point of view on the questions involving neutral rights. On the contrary, the treaty in its nineteenth and twentieth articles has a contraband list which is strictly confined to specified arms and munitions of war while the free list would satisfy the most ardent defender of neutral commerce. It includes cloth and clothing, gold and silver, coined or uncoined, metals, coal, all provisions and a detailed list of ship's stores or naval supplies, which for the sake of completeness concludes with the catch-all phrase, " and all other things proper either for building or repairing ships." It should be recalled, however, that a similarly broad free list was included in the treaty which the same countries concluded in 1677.[178] It is probable that England did not fear French carriage of these commodities if France were neutral and England at war, whereas it would be a great advantage to neutral England to have such cargoes safe from French depredations if France were at war; despite Colbert's interest in building up the maritime strength of France, the French merchant marine was a negligible factor at

(hereinafter cited: Marsden)], vol. II, pp. 348, 354. See *infra*, p. 353 *et seq.* Hall has stated this general point admirably in the Introductory Chapter to his *Treatise on International Law.*

[176] III Dumont, *Corps diplomatique* [hereinafter cited: Dumont], *Supplément*, II, p. 6.

[177] VIII Dumont, I, p. 32.

[178] See Jessup and Deák, " The Early Development of the Law of Contraband of War ", Parts I and II, POLITICAL SCIENCE QUARTERLY, December 1932 and March 1933; Part I, p. 544, note 69.

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the time of the conclusion of both of these treaties.[179] There is also evidence that the liberal attitude toward neutral commerce was due to the personal views and experiences of Robinson, one of the English negotiators, who brushed aside the instructions from London.[180] It is a question, however, whether the treaty was ever observed by either party.[181]

The French treaty with the Netherlands concluded in the same year as the Treaty of Utrecht has similar, though less detailed, contraband and free lists.[182] The English treaty with Spain, also in 1713,[183] merely reaffirms the treaties concluded before the war, especially that of May 1667.[184]

The treaty between Russia and the Netherlands in 1715 contains stipulations of the old type relative to prohibitions against aiding the enemy. The contraband list begins by including "*ante omnia homines, id est tam pedites & equites, quam socii Navales, non tantum armati sed etiam inermes.*" It is unusual to find such stress on man-power and very rare to find men included in these lists as if they were mere commodities or chattels. The promise not to aid the enemy with men is, however, quite familiar. This contraband list is very detailed in naming all sorts of weapons and it has a long list of articles useful for making or outfitting ships. All articles not mentioned are free, there being no non-contraband list.[185]

In 1716 France concluded a treaty of commerce with the Hanse Towns,—Bremen, Lübeck and Hamburg.[186] As one would expect, the contraband list is narrow but one misses in the free list the usual mention, contained in the earlier French

[179] Levasseur, *Histoire du commerce de la France* (1911), 1re Pt., pp. 324, 423.

[180] See the very interesting account of Clark in "Neutral Commerce", pp. 78-83.

[181] *Ibid.*, p. 79 and references there cited.

[182] VIII Dumont, I, p. 377.

[183] VIII Dumont, I, p. 393; English text in 2 Chalmers, *A Collection of Treaties between Great Britain and other Powers* (1790), p. 40.

[184] Jessup and Deák, *loc. cit.*, Part I, p. 542, note 59.

[185] VIII Dumont I, pp. 468, 469, Art. III. This treaty never came into force; see *ibid.*, p. 468, note 1.

[186] *Ibid.*, pp. 478, 479, Articles XIV, XV.

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treaties, of cloth, wool, cotton, silks, and so on. These articles of course remained free under general language, but only oil, wines, salt, grain and other foodstuffs are specifically named.

The treaty of 1725 between Spain and the Holy Roman Empire mentions some articles which must have had special significance for one of the parties; they are not usually included specifically. The free list mentions, in addition to wheat, wines, and oils, fruit, leather, iron and steel, all materials for making clothing for men and women "*& même les Habits tous faits, à moins que ce ne fussent des Montures entieres de Regiments, & de Compagnies.*" The contraband list includes wooden timbers for ships, sails, tar, ropes and like ship's supplies, and expressly notes that they must be destined for an enemy port. Opposite to the provisions of many of the Swedish treaties which put raw materials on the free list, this treaty classes as contraband "*toutes sortes de matieres fabriquées, & non-fabriquées, qui servent à la Guerre,*" although, as already noted, iron and steel are on the free list. Also mentioned as contraband are "*toutes les marchandises du Païs, dont la sortie seroit absolument defendwë.*" [187]

The contraband list in Article XII of the Anglo-Russian treaty of 1734 is confined to arms and munitions, with the further qualification that there may be carried such a quantity of these things as "may be necessary for the ship's provision." [188]

The treaty of 1739 between France and the Netherlands has the usual narrow contraband list, but the free list mentions specifically only various foodstuffs—grains, oil, wines, salt, etc.[189] The same terms were embodied in the Franco-Danish treaty of 1742.[190]

Before proceeding to examine the state practices and court

[187] *Ibid.*, II, pp. 114, 115, Art. VII.

[188] Pratt, *Law of Contraband of War* (1856) [hereinafter cited: Pratt], p. 238; French text in III Dumont, *Supplément* II, pp. 495, 497. The word "contraband" is not used in this or in most of the other Russian treaties of the 18th century.

[189] I Wenck, *Codex Juris Gentium* (1781), pp. 414, 427, Arts. 16, 17.

[190] I Lebeau, *Code des Prises* (1799), pp. 440, 444, Arts. 26 and 27.

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decisions of this period, it may be convenient to summarize the stipulations on contraband contained in those treaties to which England and some of the principal neutrals were parties, since England remained the principal contributor to this branch of international law. The English treaties contained a variety of stipulations. With Sweden, the controlling treaty was that of 1661,[191] which in Article XI specified as contraband arms and munitions (listed in detail), provisions, money and ships of war. The Danish treaty of 1670[192] contained no contraband list; a formal definition of contraband under this treaty was not made until the treaty of 1780. With the States General, the applicable treaty was that of 1674,[193] which confined contraband to arms and munitions and set out a free list including all kinds of provisions, raw metals and naval stores; but by the secret article to that treaty,[194] it is provided that the following shall not be furnished to the enemy: ships, soldiers, mariners, provisions, monies, instruments of war, gun powder, "or any other things necessary for making war." This secret article apparently remained secret, since it does not seem to have been cited by or before the prize court. The tripartite treaty of 1701 between England, the States General and Denmark adds only the definition of naval stores as contraband. With Russia, there was the treaty of 1734,[195] which banned only a list of arms and munitions of war.

These were the treaties which the Admiralty court was called upon to interpret and apply. The result of the decisions is clear proof that neutrals could hope to approach real freedom of trade only when the treaty contained a detailed free list.

Some light is thrown on the prize-court practice of the time by a case before the French prize courts in 1704. The Danish ordinance of 1691, issued in accordance with the agreement with the Dutch and English,[196] had contained a contraband list

[191] Jessup and Deák, *loc. cit.*, Part I, p. 540, note 49.

[192] *Ibid.*, p. 542, note 60.

[193] *Ibid.*, p. 541, note 63.

[194] *Ibid.*, p. 543.

[195] *Supra*, note 188.

[196] Jessup and Deák, *loc. cit.*, Part I, p. 545, note 77.

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which paralleled that found in the treaty. This ordinance was invoked against a Danish vessel—*Les Deux Lyons Dorez.* The brief for the captor [197] notes that it expressly declares to be contraband, cannon, steel, pitch and tar, all of which were found on the ship in question. "*D'ailleurs*", the brief continues,

> tout ce qui sert à entretenir ou à augmenter la puissance d'un ennemi est marchandise de contrebande, suivant le sentiment de Loccenius dans son Traité *de Jure Maritimo, lib. primo.*
>
> En France le bray [pitch] & le goldron [tar] ont été mis au nombre des munitions de guerre par une Ordonnance de l'année 1640 qui en défendit la sortie du Royaume; & en effet sans le bray & le goldron les ennemis ne seroient pas en état de mettre des Flottes en mer, & souvent les efforts de leurs armes deviendroient inutiles." [198]

It was further argued that the English would indubitably declare good prize a cargo of steel, pitch and tar going to France or Spain in a Danish ship. In this the French pleader was certainly correct since the English instructions to the fleet in the same year (1704) list as contraband goods "sailwork, rigging, cables, cordage, masts, lead, pitch, tar, hemp" and specifically mention Danish vessels as carriers in which such goods shall be considered contraband.[199] This particular reference to the Danes was probably inspired by the recent agreement with that country.[200]

It is not known what decision was made by the French *Conseil des Prises* in the case of *Les Deux Lyons Dorez,* but the French prize *règlement* of July 23, 1704 makes no attempt

[197] Arch. Nat., Fonds de la Marine, G5–211, "*Nouveau Mémoire Pour le sieur Saupin Armateur, Contre le Reclamateur du Navire les Deux Lyons dorez.*"

[198] This is a late example of the confusion between "Marchandises prohibées" and "marchandise de contrebande"; see Jessup and Deák, *loc. cit.*, Part II, p. 62. It is clear that the French ordinance of 1640 was not phrased in terms of contraband of war.

[199] Marsden, vol. II, p. 199. Pitch and tar on Swedish vessels were restored upon condition that the cargoes be sold in England, in four cases decided by the English High Court of Admiralty in 1703; Pratt, pp. 203-4. *Cf.* the case of the *Lion du Nord* (*circa* 1700), Jessup and Deák, *loc. cit.*, Part II, p. 84.

[200] The instructions, however, further provide that the same list shall be applicable to cargoes of vessels from other neutral countries, bound to France or Spain.

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to describe what goods shall be deemed contraband. This seems to have been deliberate, judging from a letter written by the Secrétaire d'Etat de la Marine on October 12, 1707.[201] He wrote:

J'ay lû au Roy ce que vous avez agreable de m'escrire au sujet des vaisseaux neutres qui se trouvent en partie chargez de bled pour Lisbonne, Sa Mte. m'ordonne de vous expliquer, qu'elle n'estime pas juste de confisquer autre chose que cette denrée quelle [*sic*] a regardé dans la conjoncture presente comme marchandise de contrebande qui n'emporte point la confiscation du Navire lorsquelle n'appartient pas aux Ennemis: Le Roy a trouvé bon de ne pas expliquer clairement dans l'ordre donné a ce sujet les Batimens neutres pour eviter toute question, ou plainte de la part des Princes ausquels on n'auroit pû de dispenser d'accorder quelqu'exception, mais en étendant la deffense à toutes sortes de Batimens, et sous quelque pretexte que ce soit. Il semble quelle doit être assez generale pour ne point laisser de doute sur les intentions de sa Mte.

A like caution is indicated by a letter of July 9, 1703, from the Admiral to M. de Marillac.[202] The Admiral says that he finds many of the judgments of the French *Conseil des Prises* are very explicit in giving the reasons for release or condemnation, whereas an examination of Dutch and English prize decisions shows that only the bare facts are stated without any detail as to the motives for the decision. He suggests that the French form enables the merchants to learn the exact grounds on which they can avoid condemnation and that thereafter it would be well for the French prize courts to avoid the detailed exposition of motives.

It is noteworthy that the Secretary of State in the letter above quoted admits that wheat is to be condemned as contraband, since this was quite contrary to the view which France consistently sustained in negotiations and treaties with other powers. It may be, however, that this attitude was induced by the desire to secure for France cargoes of grain of which the country stood in great need. France's enemies seem to have become aware of this shortage only in 1709, or at least

[201] Archives de la Marine, F2–25, p. 431 — Dossiers des affaires de prises portées au Conseil Royal des Finances et registres de la correspondance du secrétaire d'Etat de la marine au sujet des prises. The letter is addressed simply to "Mgr."

[202] Bib. Nat., Mss. Fr. 16732, p. 201.

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it was in April of that year that steps were taken to stop the neutral carriage of grain to France.[203]

The English attitude is clearly shown in the instruction sent by Henry Boyle, Secretary of State, to Daniel Pulteney in Denmark on April 12, 1709:

Her Majesty being informed that France lyes at present under great streights for want of corn, and that thereupon they are indeavouring to get supplys from all parts, and particularly from the northern kingdomes; which is a matter of so much consequence to her affairs, as well as those of her allies, that her Majesty has it under consideration to put a stop to that commerce, which is almost entirely carryed on in ships furnish'd with Danish or Swedish passes, and if not timely restrained will prove of the greatest prejudice to us, and a mighty relief and incouragement to our enemys. It is not yet finally determined here what method to pursue to prevent such supplys of corn being carryed to the enemy's country, but in the mean time it is thought proper that you should represent to the ministers of your court of how great an importance it is to her Majesty as well as the rest of her allys to continue the distress that France lyes under at this juncture for want of corn; and consequently her Majesty must desire that they would take care to forbid the carrying thither such supplys, because she shall think her self obliged upon this occasion to use all proper means to prevent such a necessary support being sent to the enemys; which is so agreable both to reason and justice that they ought not to think it strange if their ships laden with corn for France happen to be stopp'd and brought up as they were in the last warr. But I am further to observe to you that, tho' a total prohibition of sending corn to France be the most necessary to be insisted on at present, yet if you find your court extremely averse to such a proposal you may then try how farr they are willing to consent to the forbidding it to be carryed to any other ports or places of France, but what are farr distant from their armys and magazins. I have by her Majesty's command sent orders to Mr. Robinson to make the like representations to the court of Sweden.[204]

This instruction was closely followed by an order in council of April 28, 1709 directing the Lord High Admiral to send instructions to the commanders of ships of war and privateers "for stopping all neutral ships and vessels whatsoever that shall be laden with corne and bound to France, or the enemy's country, and to bring them into some of her Majesty's ports

[203] This trade was apparently carried on mainly in Swedish and Danish bottoms and the way was accordingly paved to quiet the opposition of those two governments.

[204] *British Diplomatic Instructions*, 1689-1789 [see Jessup and Deák, *loc. cit.*, Part II, p. 85, note 158], vol. III (Denmark), pp. 25-26.

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untill her Majesty's pleasure be further known therein." [205] A further order was issued on May 19, 1709 which specifically declared that corn bound to the enemy should be deemed contraband and that its export from England was forbidden. This order was addressed to the public and recited the great distress of the enemy for want of corn and described the corn trade with France and Spain as "a practice that so visibly tends to the support of the enemy." [206]

The Dutch acted in conjunction with their English ally. They provided for the seizure of all grain ships bound to France but paid the owner for his cargo and released the vessel.[207] The Dutch, however, practically ended the restrictions in 1710 by authorizing the export of corn to Lisbon, Catalonia, Brabant and Flanders.[208]

Undoubtedly England would have liked to treat as contraband also all naval stores, but the desire to protect her own trade in the Baltic and to assure the continuance of these supplies for herself from Sweden and Denmark [209] probably induced her to tread softly. It is probable that they too were preëmpted.[210] In 1711, the Prussian Resident was informed that pitch, tar, hemp, masts, cordage, iron and saltpeter, in addition to the usual list of arms and ammunition, were all contraband.[211]

On the outbreak of the war with Spain in 1739, the English were not at first inclined to enforce a severe interpretation of the law of contraband. The instructions issued in that year,

[205] Marsden, vol. II, p. 210. A draft, apparently drawn for this order in council, referred to the great scarcity of corn in France and to the importance of distressing the enemy by preventing his securing such supplies; *ibid.*, p. 211.

[206] *Ibid.*, p. 212. The corn, however, was not condemned as contraband but was bought or preëmpted by the English government. *Ibid.*, p. 211, note.

[207] Clark, "Neutral Commerce", p. 77 and edicts there cited.

[208] *Loc. cit.*

[209] *Cf.* the instruction to Robert Jackson, minister at Stockholm, May 11, 1710, *Br. Dipl. Instr.*, vol. I (Sweden), pp. 41 *et seq.*, at 43. Further light might be thrown by decisions of prize courts but they are not available to the writers for this period.

[210] *Cf.* the decisions in the British Prize Court in 1703, *supra*, note 199.

[211] See Satow, *The Silesian Loan and Frederick the Great* (1915) [hereinafter cited: Satow], p. 121 and document there cited.

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in Article II, directed the capture of all ships carrying to a Spanish port "soldiers, arms, powder, ammunition, or any other contraband goods." It apparently was not clear what were "other contraband goods" and an opinion on the subject was given by J. Andrew, March 31, 1741.[212] Andrew gives a list of arms and munitions of war and then continues: "But ropes, sails, anchors, masts, planks, boards, and all other materials for building and repairing ships are reputed free goods; and all wares and merchandizes except as above mentioned may be carried by neutral ships into the enemy's country except to places blocked or invested." Unfortunately for the neutrals, this opinion did not guide the government or the High Court of Admiralty.

A declaration from the king to the Lords of the Admiralty on April 30, 1744 speaks of the protests of the Dutch against interference with their trade. The royal wish was declared to be that the treaty of 1674 as confirmed by subsequent treaties with the States General, should be strictly observed and he apparently concurred in the Dutch desire that English sea captains should not seize Dutch vessels "by a larger interpretation than was meant to be given to the general words in the said declarations [of war by the English against Spain and France], viz. 'other contraband goods'. . . ."[213] The treaty of 1674 which is referred to had an extensive free list which included all sorts of provisions and materials for building and equipping ships.[214] The instructions to privateers issued June 18, 1744 stated that Dutch ships were to be treated in accordance with the treaty of 1674. For Danish, Swedish or other neutral ships however, a detailed contraband list is given, including the usual list of arms and munitions and naval stores.[215]

[212] Burrell, *Reports of Cases Determined by the High Court of Admiralty and Upon Appeal Therefrom* (edited by Marsden, 1885), p. 377. This and other opinions printed in this collection by Marsden are selected from manuscript notes of Sir W. Burrell.

[213] Marsden, vol. II, p. 303.

[214] See Jessup and Deák, *loc. cit.*, Part I, p. 543. The special treaty of 1691 was concluded with reference to the alliance against France and did not have general application. *Ibid.*, p. 544.

[215] Pratt, App. B, p. 257; Marsden, vol. II, p. 428.

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Yet in 1745, the order went out to British warships to send in to port all neutral vessels laden with naval stores.[216] Full details were to be made the subject of a special report and there was to be great care taken against pillaging. It was indicated that the final disposition of such ships would be determined later, which probably indicated an intention to preëmpt rather than to condemn as good prize. Almost immediately, however, this order was modified by directing that not all ships with naval stores were to be seized, but only such as carried "large masts, yards, anchors, and cables, of a size to be used on board ships of war." [217]

It may be that the English government had in mind their own quarrel with Sweden when the shoe was on the other foot. Swedish regulations of July 28, 1741 had included as contraband sail cloth and cloth for soldiers' uniforms. Paul, Admiralty Advocate, writing to the Lords of the Admiralty from Doctors Commons on September 3 of the same year, noted that these articles are not contraband under the Anglo-Swedish treaties of 1654 and 1661 and that the enforcement of the Swedish regulation might have serious effects upon the British wool trade.[218] The treaty of 1661 had listed provisions and money as contraband, but not naval stores, although the

[216] The Dutch were not expressly excepted but the Dutch treaty was rather scrupulously observed throughout the period. Numerous cases of release of Dutch ships with costs and damages will be found in Br. Rec. Off., Doctors Commons Adm. II, 3882. Some years later, in an opinion of September 19, 1778, Sir James Marriott interpreted Article IV of this Dutch treaty as follows: "One great leading Article is—'The enemy is not to be aided'—which he would be if any larger sense was allowed to Art. IV of the Treaty of 1674 than this, Viz. the masts, planks, boards and beams and materials requisite for building or repairing ships which are declared privileged in the said 4th article can only mean for ordinary merchant ships of the size and built [*sic*] usual (& which was very small) at the time of that Treaty. The lenity of the Decisions of the High Court of Admiralty in the last War was remarkable towards the Dutch in this particular." Br. Rec. Off., Law Officers' Opinions, 27 Jan., 1778 to 24 Feb., 1783, Adm. Sec. Misc. 7/300.

[217] Marsden, vol. II, pp. 321 and 322. As printed by Marsden, the restrictive order, referring to the previous broad instruction, is dated March 22, 1745, whereas the sweeping interdiction is dated October 15, 1745; apparently the former order was actually dated March 22, 1746.

[218] *Ibid.*, p. 290.

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special agreement of 1656 had so included them for the course of the then current Anglo-Spanish war. On a different matter, involving the case of some Hamburg ships, Penrice advised the secretary of the Lords that "notwithstanding the crown of Great Britain is at war both with France and Spain, neutral nations ought to enjoy the benefits granted to them by treaties."[219] In the following year, May 11, 1745, Penrice asked the Lords to declare whether pitch and tar on Swedish ships bound to enemy ports should be deemed contraband. He points out that they are free under the treaty of 1661 and says he knows of no later treaty although the existence of one might be implied from the instructions to privateers in 1744.[220] It was apparently in response to this inquiry that the above orders of 1745 and 1746 were issued by the Lords of the Admiralty.

Apparently the same procedure of preëmption was applied to cargoes of corn but in both cases the English government encountered difficulties because the Navigation Act prohibited the importation of these articles in foreign bottoms except when they were the produce of the country to which the ships belonged, and the law officers were of the opinion that they could not lawfully be brought in and purchased by the government.[221] The Lords of the Treasury concurred in this opinion and the Lords of the Admiralty accordingly took steps to have an appropriate act passed by Parliament. Such an act was passed in the same year to permit the purchase of naval stores.[222]

In the available reports of the cases before the English prize courts, however, naval stores are frequently condemned as contraband. In 1745, Penrice restored a Danzig ship, *The Fortune de la Mer,* carrying timbers to Brest, although the captors argued the cargo was contraband. Penrice declared:

[219] *Ibid.*, p. 308, at 311.

[220] *Ibid.*, p. 318.

[221] *Ibid.*, p. 323. Marsden, tantalizingly enough, prints only a fraction of this opinion dealing with the technical legal point although he remarks that it contains "an interesting account of the steps taken in the past by the English Admiralty to prevent corn and provisions falling into the enemy's hands." The original manuscript has not been available at the time of this writing.

[222] 19 Geo. II, c. 36.

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It does not appear the Dantzicker had any ill-intention to supply the enemy; but he meant only to end his commodity, and they also supply us with the same commodities.

Contraband is of an uncertain signification; but many treaties have expressly declared naval stores not to be contraband.

The Crown may make a declaration what shall be contraband, and then any contraveneur will be liable to confiscation.[223]

This ship was captured several months before the issuance of the instructions of June 18, 1744. The Danish ship *T'Slots Copenhagen* was captured after that date laden with timber fit for masts and was condemned by the Court without specific reference to the instructions or to the terms of the Danish treaty of 1670 in which the contraband list is cast only in general terms. The opinion of the Court in this case is interesting for its suggestion of the idea of goods conditionally contraband although the idea is not followed through in the brief notes of the decision which are available. It was said *per curiam,*

Naval stores are not *apta bello per se,* but are afterwards to be adapted. Various distinctions upon these goods which are *promiscui usus.*[224]

Pitch and tar in a Swedish vessel thought to be going to a French port, were condemned in the case of the Swedish ships *St. Nicholas of Gothenburgh*[225] and the *Louisa,* and *The Hewa.*[226] Although the claimants argued for release on the basis of the treaty and said the king's instructions to privateers could not override the treaty, the court followed the instructions with the additional general remark: "Pitch and tar absolutely necessary for navigating all ships, and therefore must be deemed contraband." In the case of another Danzig

[223] Pratt, pp. 33, 39-40. The notes of the decisions as printed by Pratt are probably memoranda prepared by the judge but not included in the actual decision, which was probably rendered in formal terms without full exposition of reasons. See the form of sentence in 1759 in Marsden, vol. II, p. 384, and *cf. supra,* p. 340.

[224] Pratt, pp. 40, 48, decision of Feb. 21, 1745-6. In a later case, the court said that in the instant case the naval stores were "in some sort" French; *The Juffrow Susanna, ibid.,* pp. 67, 73.

[225] *Ibid.,* p. 57.

[226] *Ibid.,* pp. 61 and 62; all three decisions were rendered on March 3, 1746.

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ship, the *Juffrow Susanna,* laden with ship's timbers for Brest, the cargo was condemned. The court noted that the owner of the timbers was the same as he who got off in the case of the *Fortune de la Mer.* Special note was taken of the fact that these timbers were suitable for building warships and that only such ships were built at Brest. The cargo was deemed contraband because "fit for men-of-war"; the destination to a naval base was relied on to determine the nature of the goods rather than destination to armed forces of the enemy as the modern idea of conditional contraband would require. In all of these cases there are various details of suspicions about the intentions of the traders which seem to have had great influence with the court. This merchant was thought to be "aiding our enemies, contrary to the Laws of Nations." [227] The emphasis on the fact that these timbers were suited for warships was undoubtedly due to the instruction of March 22, 1746, which had limited the description of contraband naval stores to those which were so suited.[228]

In the case of the Portuguese ship *Nostra Seignora de Pentha de Franca,* the High Court of Admiralty made a sweeping decision in regard to provisions, which, they declared, "are and always have been esteemed contraband." [229]

The Russian ship *De Providentia* was restored with its cargo of naval stores on the basis of the Russian treaty of 1734, which had no free list but clearly implied a right to trade except in munitions of war. The court noted that the instructions to privateeers expressly declared naval stores to be contraband, but held by the treaty, although the seizure was held to be justified since "Privateers have not the treaties given them." [230] As was usual in many earlier decisions, the claimants were required to give bond that they would sell the cargo in England, but this part of the decree was reversed by the Lords, who affirmed the restoration of the ship and cargo.[231]

[227] *Ibid.*, p. 67, decision of June 26, 1746.

[228] *Cf. supra,* note 217.

[229] *Ibid.*, pp. 90, 93, decision of Sept. 5, 1746.

[230] *Ibid.*, pp. 97, 98, decision of March 18, 1747. [231] *Loc. cit.*

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An examination of twenty-eight cases reported by Pratt as decided during the period 1745-50, shows that provisions were condemned as contraband in nine cases of which four involved Swedish ships, three Danish, and one each from Portugal and Prussia. In the cases of two Dutch and one Prussian ship, provisions were released as not being contraband. As to naval stores, they were held to be contraband in the cases of one Prussian, one Portuguese, four Danish and four Swedish ships. They were held to be free in the case of one ship from Danzig and of one from Russia, and, for special considerations, in the cases of one Portuguese and one Danish ship. Several principles stand out in these cases which were decided by Sir Henry Penrice: there is a good deal of talk about what goods are by nature contraband, but this does not usually prevail over specific regulations; the British instructions are generally held to be controlling and when they appear to be in contradiction to a treaty, the treaty is either reconciled by interpretation, at times highly strained, or else the judge assumes that the political department of the government must have concluded some new agreement which has not been communicated to him. There are a few suggestions of support for the old idea that a belligerent may by proclamation determine what goods are to be deemed contraband during the war then in progress. The unsettled status of the existing rules of international law regarding contraband of war is frequently and frankly admitted. It is clear that the High Court of Admiralty did not interpret the instructions as contemplating merely the preëmption of cargoes although this was the policy clearly indicated by the Lords of the Admiralty and confirmed by the act of Parliament already referred to.

The opinions of Penrice in these cases, though reported in outline form only, are highly illuminating. The following extracts from his opinion in the case of the Prussian ship *De Klein David,* in which he released a cargo of wine and brandy, are characteristic:

> Contraband has admitted various interpretations agreeable to the state of the cases.
>
> Princes declare sometimes things to be contraband which are not so in

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their nature, and in those cases notifications thereof are given to other sovereigns. . . .

The law of nations is uncertain, and the determinations upon it very various. Treaties have determined what shall be and what shall not be contraband.[232]

In this case he had no treaty to rely upon and the outstanding instructions do not mention provisions. His release of the cargo, was, however, affirmed by the Lords. A cargo of wine and brandy on the Swedish ship *Elizabeth Catherina* [233] had, however, been condemned by him in the previous year on the ground that they were provisions and provisions are declared to be contraband in the Swedish treaty of 1674. A small quantity of beer on a Prussian ship was held not contraband,[234] but where it was shipped in large quantities on a Danish ship, it was condemned, for "surely beer is in its nature contraband, as being a species of provision." [235] Similarly, "Rice is corn, and certainly is provisions", and "Herrings in a large quantity must be for food and the quantity will make them contraband or not. *De minimis non curat lex.*" [236] In the case of the Swedish ship *De Jonge Tobias,*[237] a cargo of salt belonging to Dutch merchants was condemned, salt being deemed provisions and therefore contraband under the Swedish treaty,[238] although it would have been free under the Dutch treaty if the owner had had the good sense to lade it on a Dutch vessel to which the Dutch treaty would have applied. A suggestion of the modern idea of the necessary destination of conditional contraband is found in the statement: "This whole lading was going to Dunkirk, where it was useful both for the French army and for their privateers."

[232] Pratt, pp. 170, 177, decision of October 22, 1748.

[233] *Ibid.*, p. 115.

[234] *De Eendraght, ibid.*, p. 123.

[235] *Margareta Elizabeth, ibid.*, pp. 160, 163.

[236] Both condemned in the *St. Johannes* of Denmark, *ibid.*, pp. 166, 169-170. *Cf.* the like quantitative measurement of barrels of shot in *De Wilhelmina Catharina, ibid.*, pp. 180, 187.

[237] *Ibid.*, p. 187.

[238] Penrice says, "*Commeatus* [the word used in the Swedish treaty] a general word for all provisions public and private."

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The destination is considered a matter of great importance throughout these cases. Where it was doubtful whether cargoes of timber, etc. should be deemed contraband, they were usually condemned if destined to a naval base like Brest or Dunkirk.

The question of naval stores gave Penrice considerable trouble; the importance of the question in the minds of the English government has been noted above from time to time. From a reading of the treaties, one would have supposed that these goods would be non-contraband on Dutch, Swedish and Russian ships, with a chance for argument as to the Danish treaty. It was particularly this category of goods upon which Prussia centered its attention and, having no treaty, endeavored to secure assurances of free trade from the English government.[239] Yet naval stores were condemned as contraband in ships of Denmark, Sweden, Prussia and Portugal and held generally not contraband only on ships of Danzig and Russia. In the case of the Prussian ship *De Tweelinge,* spars and lumber were condemned as contraband. Penrice noted that there was no treaty with Prussia, that "Sovereigns have a right to declare what shall be deemed contraband, and have always done so", and that the royal instructions had in fact declared naval stores to be contraband.[240] Hemp was condemned although "not contraband in its own nature",[241] because it was included in the instructions and there was no treaty with Prussia. A Portuguese ship, *Princessa de Brazils,* had her cargo of planks and deals released because they "do not appear to be for shipping, or to be contraband."[242] So

[239] See *infra,* p. 353 *et seq.*

[240] Pratt, pp. 105, 108. In the Prussian protest (discussed *infra,* p. 354) this ship is listed as *Les-Jumeaux,* and a few details differ from Pratt's report.

[241] *Ibid.,* p. 109, case of the Prussian ship *Fredericus Secundus Koning von Prussien.* The Prussian minister interceded in behalf of the claimants in this case on another point and the ship was finally restored though not the cargo. See Marsden, vol. II, p. 336. A report of the case is also to be found in Br. Rec. Off., Adm. I, 3881. In the Prussian protest no claim is made in regard to the cargo. Hemp frequently appears in the treaty lists with other naval stores.

[242] *Ibid.,* pp. 129, 133.

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a cargo of spars, boards, timber and iron on the Danish *Ebenezer* was released because the alleged French destination was not proved.[243] In the case above mentioned of the Russian ship *De Providentia,* the cargo of naval stores was released on the basis of the treaty of 1734, which though it had no free list, certainly seems to have meant that all goods not on the contraband list were free. Yet in the case of the Portuguese *Santa Boa Ventura,* tar and heavy wood were condemned because "What is contraband in its own nature, is so on board all ships",[244] and "The heavy wood is of use in shipping, and comes under the nature of contraband as part of the equipage of ships."[245] Pitch, tar, spars and balks were all deemed contraband on Danish ships as being "useful for shipping" and comprised within the phrase "equipage for sea" which was used in the instructions of 1744.[246] On this category of goods, however, the leading case seems to have been that of the Swedish ship *Med Guds Hielpe.*[247] She was laden with pitch and tar and bound from Stockholm to Port Louis, France. Penrice gave what appears to be a preliminary opinion in which he considered the question of passes under the treaty and also the question of contraband, which he said was "a question of great moment, and deserves to be well considered." He examines the text of the Swedish treaty of 1661 and notes that Article XI in stating that contraband shall not be carried, adds *"et specialiter"* before listing the articles so denominated; those words, he suggests, "may fairly be interpreted to be *for example.*" The treaty, however, continues, after the contraband list, that it shall be lawful to carry to the enemies of the other party "any merchandize whatsoever not above excepted", which, judged by the general treaty language of the time, might well be considered to make the contraband list

[243] *Ibid.*, p. 136.

[244] *Cf.* the statement in the case of the Dutch ship, *De Vlught Naa Aegypten,* that lead "aboard all neutral ships that are not under the privilege of treaties, is contraband"; *ibid.*, pp. 125, 129.

[245] *Ibid.*, pp. 137, 141.

[246] Cases of the *De Providentia* and *Brigitta Catrina, ibid.*, pp. 144 and 153.

[247] *Ibid.*, pp. 191, 197; reprinted also in Roscoe, *Reports of Prize Cases* (1905), vol. I, p. 7.

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a complete and absolute category. Penrice, however, remarks that since the instructions expressly say that pitch and tar shall be contraband, "one would imagine some modern treaty with Sweden has expressly declared them to be contraband." He took time to consider and gave sentence on August 9, 1745. The opinion condemns the ship and cargo as good prize, confirms the ideas he had already suggested and is notable for its Grotian statement on the nature of contraband goods. It reads in part as follows:

Pitch and tar are not enumerated in the 11th article of the Swedish Treaty, but I rather think those enumerated were mentioned rather for example than by way of exclusion, and that there are other contraband goods than what are mentioned in that article.

Three species of goods—

1st. For immediate use of war, in the manner they are and those are, contraband.

2nd. Of a mixed nature, which may be of use for war and for other purposes, and these sometimes are, and sometimes are not contraband.

3rd. Things for pleasure, and which are of no use in war, and those are not contraband.

Pitch and tar are of a mixed nature; may be used for civil purposes, and also for fitting ships of war. Sovereign Princes at war may declare such and such things to be contraband, and after notice to their allies, their subjects may certainly seize them. The *Arms of Plymouth*, in 1692, is the strongest case that has been cited for condemning this ship.

In the old instructions the 11th and 12th articles of the Swedish Treaty were inserted.

Now they are not inserted, and I suppose the reason was, because by the present instructions pitch and tar in Swedish ships are expressly declared to be contraband.

The case was appealed to the Lords of Appeal, whose decision was not rendered until June 29, 1750. Penrice was affirmed, the Lords pronouncing the cargo "contraband by the laws of nations and within the treaty with Sweden." [248]

[248] Pratt prints also (pp. 201-205) "Notes for Argument in the Case of the Med Guds Hielpe"; it does not appear whether these were prepared by counsel or by Penrice. They contain quotations from Bynkershoek, Grotius and Gronovius, and a summary of cases including the opinion of Sir Robert Wiseman (Jessup and Deák, *loc. cit.*, Part II, p. 86), five cases decided in 1703 in which pitch and tar on Swedish vessels were released on condition they be sold in England, and one case in 1692—the *Arms of Plymouth*, referred to in

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One case deserves special mention because of its suggestion of the rule of continuous voyage. This was the case of the French ship *Marlborough,* sailing from Amsterdam to Bayonne with a cargo of guns, powder, cannon ball and other munitions. At the time of her capture, England was at war with Spain but not with France. In condemning the ship, Penrice apparently lays stress on the probability that the munitions are enemy property but also treats them as contraband goods and says "Bayonne and St. Sebastian are very near; the stores may very easily be carried from Bayonne thither." [249]

The most notable dispute which England had at this time on the subject of neutral rights at sea was that with Frederick the Great of Prussia. The dispute is chiefly known, however, because in the course of it, and partly as a measure of reprisal, Frederick stopped payment on the so-called Silesian Loan.[250]

While it is probably true that Frederick would gladly have seized any excuse to escape from the onerous financial obligations to English bondholders, it is certain that the English treatment of Prussian ships and cargoes was a real cause for serious resentment and not merely a pretext. Two weeks after the English counter-declaration of war against France in March 1744, he instructed his minister in London, Andrié, to find out from the English government what they considered contraband of war and specifically whether such things as

Penrice's opinion—in which a Swedish ship with pitch and tar was condemned, the decision affirmed by the Lords, but "The King in Council ordered the proceed [*sic*] to be restored to the owners. . . ."

[249] *Ibid.*, pp. 24, 32. See also the ineffective argument of the captors in the case of the Dutch ship *Vriendschop*, 1747; Br. Rec. Off., Doctors Commons, Adm. I, 3881. The doctrine or rule of continuous voyage has an obviously important place in the study of the law of contraband of war. The doctrine, however, was first applied chiefly to neutral participation in the normally closed colonial and coasting trade as exemplified by the well-known Rule of the War of 1756. These aspects will not be considered here; they are well covered by Gantenbein, *The Doctrine of Continuous Voyage* (1929), pp. 3-34.

[250] This *cause célèbre* will be considered here only in regard to the question of contraband. The most detailed and authentic discussion of the entire affair is that by Sir Ernest Satow, *op. cit., supra,* note 211. Satow's running story, as well as his 117 appendices of hitherto unprinted documents, is used as a basis here.

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grain, timber, hemp, textiles, etc., were included, in order that he might give proper warning to his subjects as to how to carry on their trade.[251] Carteret (afterwards Lord Granville), who was then foreign minister, evidently gave Andrié rather sweeping assurances that Prussian merchants need have no worries about interference by English warships or privateers. He specifically stated that naval stores were not considered contraband.[252] This undertaking, however, was never put into writing and it later was argued that a minister had no authority to bind the prize court, which was governed only by the law of nations and treaties.[253] But the Prussians relied upon the verbal representation and protested in detail against the capture and condemnation of Prussian ships and cargoes.[254] Prussia asked specifically for the application to her ships and cargoes of the Franco-Dutch treaty of 1739, and the Anglo-French treaty of 1713, both of which had narrow contraband lists and free lists including grains and naval stores.[255] This request was answered merely with platitudes, and Frederick replied "that he could not allow any wider definition of contraband than powder, arms, cannon, and cannon-balls," [256] threatening at the same time to hold the balance due on the Silesian loan.

It was not until 1752 that matters finally came to a head with the preparation and delivery of the Prussian *pro-memoria,* to which was annexed the "sentence" of three jurists who, on the question of contraband, declared:

Que les Marchandises reputées de Contrabande, pendant la Guerre se trouvent succinctement determinées dans les Traités de Navigation, et dans la Declaration formelle, faite par le Ministére Anglois au Sieur Andrie, Envoyé du Roi, et que sous cette Denomination, ne sauroient étre comprises, ni les Marchandises libres, et permises, appartenants aux Ennemis, ni, en

[251] Satow, p. 12.

[252] *Ibid.* The conversations and correspondence are summarized by Prussia in their *Pro-Memoria* of 1752, *ibid.*, pp. 47 *et seq.*

[253] Penrice wrote Corbett in 1748 that he knew of no such agreement and asked for a copy; Marsden, vol. II, p. 346.

[254] Satow, pp. 20-21.

[255] See *supra,* pp. 335, 337.

[256] Satow, p. 22.

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general, les Bois, le Seigle, et autres Effets, qui ne sont point Munitions de Guerre.[257]

In the *pro-memoria* itself, it was stated that for one year the British privateers respected the undertaking given by Carteret in 1744, but that thereafter they disregarded it entirely.[258] In elaborating the argument on contraband, there is emphasis on the general freedom of neutral trade under the law of nations and insistence that only munitions of war are contraband by that law. There is also an attempt—obviously hopeless—to prove that in the past England had always admitted and acted upon this rule. Treaties supporting the Prussian position are also adduced. Specific cases are then cited in which during the then current war wood and rye had been condemned as contraband to the damage of Prussian merchants.

The report of the Crown law officers, which was transmitted to Frederick with the English reply, insisted that the verbal declaration of a minister could not be binding, but that, as a matter of fact, the actual disposition of the cases listed by the Prussians did not sustain their charges.[259]

Both parties to the quarrel sought to convince the French court of the soundness of their contentions, but on the question of neutral rights, French sympathies could hardly be with the English position. The French views were fully set out in April 1753 in a *mémoire* delivered to the English government.[260] The *mémoire* deals rather fully with the law of contraband, criticizing the English law officers for not being more detailed in their discussion of the subject. The French government did not believe that

les Nations de l'Europe, sont d'accord sur ce que l'on doit entendre par Marchandises prohibées ou de contrebande. Si chaque nation prétendoit décider par une volonté arbitraire de ce qui doit s'entendre par Marchandises de contrebande, et s'arroger le jugement de tout ce qui peut fournir à

[257] Satow, Appendix 33, p. 246. A full list of the ships involved in the Prussian complaints is appended to the "sentence".

[258] The text of the *pro-memoria* is in Satow, pp. 47 *et seq.*

[259] This famous report, signed by Lee, Paul, Ryder and Murray (later Lord Mansfield), is printed by Satow, pp. 77 *et seq.*, and by Marsden, vol. II, pp. 348 *et seq.* It does not say much on the specific question of contraband.

[260] Satow, Appendix 75, at pp. 342 *et seq.*

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l'ennemy de quoy poursuivre le guerre, on pourroit enveloper sous ce vaste prétexte presque toutes sortes de Marchandises et d'effets.

On auroit attendu des Magistrats consultés par Sa Mté. Britannique, qu'ils auroient expliqué avec précision ce quil faut entendre par Marchandises de Contrebande, et qu'ils les auroient nommées et Specifiées, afin d'écarter solidement toutes les contestations qui pourroient s'élever sur la nature de ces Marchandises.

Au defaut de notions assez précises, on doit regarder les Traités faits entre les différentes Nations de l'Europe comme les énonciations les moins équivoques, et les plus impartiales de ce qu'elles ont pensé sur les Marchandises de Contrebande.

Or par les Traités, cette dénomination doit en général se restreindre aux Soldats, cheveaux, [*sic*] armes et munitions de guerre, et aux vivres que l'on porteroit à une place assiegée ou bloquée.[261]

It is accordingly concluded that the condemnation of wood and grain was improper. Frederick had his experts prepare a replication to the English answer, but it was never delivered.[262]

As the affair approached a settlement, Frederick gave instructions that he must have an undertaking from the English that they would not trouble the Prussian trade or that at least they would "state to me what they call contraband, in order that I may warn my merchants beforehand, and by this means avoid everything that might disturb the good understanding between the two nations."[263] The English were unwilling to make such a statement, on the ground that the admiralty court could be guided only by the law of nations or by treaty. Since the former was rather uncertain, the English government was willing to conclude a commercial treaty on the model of that of 1661 with Sweden.[264] This was highly agreeable to Frederick, but the treaty signed in January 1756 contains no provisions on the subject.[265] On the same day a separate declaration embodied an agreement that Frederick would pay the balance on the Silesian Loan and that England would pay

[261] *Loc. cit.*, at p. 344.

[262] Satow, p. 178; see Martens, *Causes Célèbres du droit des Gens* (1827), vol. II, pp. 97 *et seq.*, at pp. 156 *et seq.*

[263] Satow, p. 192.

[264] *Ibid.*, p. 194.

[265] It does not appear why this was the case.

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twenty thousand pounds in full satisfaction of all the Prussian claims.[266] Satow says that in so doing they evidently recognized a debt of honor due to Carteret's assurances, but that they did not yield on any contention regarding the rules of international law.[267]

The whole affair well illustrates the uncertainty which at this period still existed regarding the determination of contraband of war by the law of nations and shows that it was only in specific free lists in treaties that the neutral could find any security for his trade. It is clear also that England's position met with the opposition of most of the neutral countries and that Prussia and France did not in the least concede that her stand had any legal foundation.

Conclusions

Although the above survey makes no pretense of completeness, the authors believe that out of this pre-Stowellian period the following propositions may be extracted:

1. A law of contraband of war existed and its violation resulted frequently in compensatory awards by the violator; no government or statesman seems to have denied the existence of the law.

2. The law of contraband of war did not develop by the process of logical deductions from the principle that a belligerent might lawfully prevent a neutral from supplying anything which was useful for war to the opposing belligerent.

3. Neither was there a similar logical development from the proposition that a neutral's right to trade even in time of war was superior to the exigencies of belligerent interests.

4. With much inconsistency and constant fluctuation, statesmen and prize courts applied rules which at the moment served the interests of the state.

5. Consistency is found only in so far as national economic and political self-interest remained constant.

[266] The texts of the treaty and declaration appear as appendices 115 and 116 of Satow, pp. 416 and 418.

[267] *Ibid.*, p. 199.

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6. A century or more of familiarity with the notion of a law of contraband of war did not serve to establish concordance between the opposing views of the English and their continental neighbors.

7. Despite occasional breaches of treaty obligations, the period demonstrates that it was possible to establish working rules by bipartite treaties, granting the somewhat frequent revision of those treaties.

8. In concluding such treaties, the employment of general phrases merely sowed the seeds of future discord.

9. The inclusion in treaties of lists of contraband articles was far less useful to neutrals than the inclusion of detailed free lists.

10. Neither Lord Stowell nor the prize-court judges of 1914 dealt with essentially novel cases; factual differences did not reflect differences of underlying principles.

It may not be too bold to assert that in general the above propositions could equally well follow a survey of this subject from the middle of the eighteenth century to the close of the American Civil War or down to the outbreak of the World War. This last great conflict is instructive in suggesting certain new devices by which the perpetual clash of interest between neutral and belligerent may be adjusted; it reveals little that is fundamentally new in so far as that basic clash is concerned.

Utilizing the experience of three centuries, some treaty adjustment could probably be framed in a thoroughly realistic way. Despite pacts and covenants it might be useful to attempt to draft such a treaty before another conflict makes us again lament its absence.

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THE OCCUPATION OF ALGIERS IN 1830: A STUDY IN ANGLO-FRENCH DIPLOMACY

THE Congress of Vienna established only a recess in the colonial and commercial rivalry between England and France. In 1830, just fifteen years after a presumably permanent adjustment had been reached, French troops occupied the strategic port of Algiers. This was a violation of the *status quo* which the English so zealously defended, especially in that particular region. For the same reason that caused them to resist forcibly Napoleon's attempted conquest of Egypt they contested the right of the French to occupy Algiers. Furthermore, they feared that this port, once occupied, would serve as a base for more extensive conquests. This was their chief concern and consequent developments proved the truth of their contention.

The immediate cause for the occupation of Algiers was not so much a desire for colonial possessions as the ambition of Charles X to establish absolutism in his government. This he believed could be accomplished without much opposition by a magnificent display of French arms. On the one hand he hoped to direct a victorious army, while on the other he slyly planned the destruction of a rebellious Assembly. His first plan, to extend the French boundary to the Rhine River, had been for decades a popular but unrealized desire. Extensive plans were made for the alteration of the political map of Europe but they failed because of opposition and lack of coöperation.[1] Nevertheless this failure did not daunt the French king and his minister Polignac. Another choice was

[1] Affaires Etrangères, Correspondance Politique, Russie 178 [hereafter this will be abbreviated as A.E.C.P.]. Stockmar, *Memoirs*, vol. I, pp. 139 *et seq.* Alfred Stern, "Der grosse plan des Herzog Von Polignac, jahr 1829", *Historische Vierteljahrschrift*, 1900, pp. 49-97. France was to receive Belgium and some of the Rhine Provinces; Russia, Turkish territory; Mehemet Ali, the Sultan's African possessions; England, the Dutch colonies; Austria, Bosnia and Servia; and Prussia, Holland and Saxony. The hope that Russia might be a possible ally in such a project was dispelled by the Treaty of Adrianople.

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made. This time they decided upon northern Africa, where they believed the same results could be attained without the international complications that were so evident in the earlier project.

Even before the decision was made, a virtual state of war existed between France and the Dey of Algiers. The port had been blockaded for some months in an attempt to bring the Dey to account for insults he had heaped upon the French.[2] This to the French was a sufficient cause for war and Charles X believed that even England would remain neutral if she were assured it was only a humanitarian act to rid the Mediterranean of pirates.

England however was not so easily convinced. Wellington, the prime minister, had for some time viewed with alarm the activity of the French fleet in the harbor at Algiers. As early as May 1829 the French government was notified that "any change in the *status quo* in the Mediterranean would incur opposition".[3] The English consul at Algiers, knowing the general attitude of the government he represented, vainly offered his services as mediator.[4] The blockade continued. This manifest opposition came before anyone in England knew of the proposed occupation. On January 11, 1830 Laval was instructed to break the news to Wellington. In doing so he portrayed the Algerian pirates as a menace and a disgrace to Christianity and emphasized the unbearable humiliations which the French had suffered. He assured Wellington that the French would succeed. Mehemet Ali was to be their ally. Laval heaped insult upon injury by suggesting that as Tripoli, Tunis and Algiers were all practically independent of the Sultan, no infringement on the general political status would be made.[5]

A French expedition against Algiers alone was enough to antagonize the English but to have Egypt, Tripoli and Tunis

[2] Affaires Etrangères, Mémoires et Documents, Algérie IV [hereafter this will be abbreviated as A.E.M.D.]. French Consul to Polignac, 1829.

[3] A.E.C.P., Angleterre 627. Roth to Portalis, May 11, 1829.

[4] A.E.M.D., Algérie IV. St. John to La Bretonnière, December 10, 1829.

[5] A.E.C.P., Angleterre 629. Polignac to Laval, January 15, 1829.

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involved was, to them, beyond endurance. This would endanger practically the whole of northern Africa and place France in a dominant strategic position for the control of the Mediterranean. Wellington protested in behalf of the integrity of the Turkish Empire. He had Aberdeen, the foreign secretary, write to Gordon, the English minister to Constantinople, "to represent to the Turkish Government the necessity of using every possible endeavor to induce the Dey of Algiers to make ample and prompt reparation to the King of France to prevent the expedition." [6] He summoned Laval and not only expressed his disapproval of the expedition but characterized it as an absurdity. "I cannot but view this scheme as one tending to establish in the Regency a French system instead of a Turkish one. It is folly for a nation as strong as France to seek aid in attacking a place no stronger than Algiers", he declared.[7] In a letter to Wellington, shortly after the plans were made known, Frère expressed the prevailing opinion as follows: "It is useless to imagine that the French will remain satisfied without aggrandizement of some kind. . . . In 1830, this probation must be considered as having expired. Their vanity must find an outlet somewhere. They feel that the Rhine is their limit but if we oppose that we must let them seek an outlet in some other direction." [8]

Gordon interviewed both the Sultan and Guilleminot, the French agent at Constantinople. He proposed that a commission composed of members agreed upon by both be appointed to settle the impending dispute. The Sultan immediately complied and announced Tahir Pacha as his choice but Guilleminot delayed, saying that he was waiting for instructions from Paris.[9] After a delay of almost a month Tahir Pacha had to proceed alone on his hazardous mission.[10] Stuart in-

[6] Foreign Office, Turkey 27/188 [hereafter this will be abbreviated as F.O.]. Aberdeen to Gordon, January 20, 1830.

[7] F.O., France 27/405. Aberdeen to Stuart, February 2, 1830.

[8] *Wellington's Despatches*, vol. VII, p. 27. Frère to Wellington, May 8, 1830.

[9] F.O., Turkey 78/184. Gordon to Aberdeen, February 7, 1830.

[10] *Ibid.*, same to same, March 2, 1830.

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terviewed Polignac as soon as he learned of the departure and tried to arrange for a preliminary conference. Polignac refused and ordered Tahir Pacha arrested, declaring to Stuart that he had had too much experience with the Porte's utter inability to influence the authorities at Algiers to induce him to advise his sovereign to delay measures for obtaining the object by force.[11] Stuart continued his protests and on the following day Polignac openly refused any form of mediation, confessing that "the attainment of the ostensible object of the expedition by means of negotiations would not produce the effects in France that were to be expected from a military success."[12]

Meanwhile, extensive plans for the expedition were being made at Toulon. So elaborate were they that Aberdeen complained to Polignac.

> This extensive preparation is to be regarded with suspicion. Your Excellency is already aware of the sincere desire which His Majesty entertains that the injustice and the affronts which have been indured by the King of France from the Regency of Algiers may be duly arranged and that His most Christian Majesty may exact reparations from the state; but the formidable force about to be sent . . . appears to indicate an intention of entire destruction of the Regency rather than the inflection of chastisement.[13]

The English were so pronounced in their protest that Laval wrote to Polignac declaring that unless something was done he believed the English would oppose their expedition by force.[14] Polignac, somewhat alarmed, sought to relieve the tension by an explanation of French intentions. In a long letter dated March 12, he stressed the humiliation the French consul had experienced, related the absolute disregard of the Dey for all forms of maritime law, and closed the letter with a promise "that if the existing Government at Algiers should

[11] F.O., France 27/408. Stuart to Aberdeen, March 26, 1830.

[12] *Ibid.*, same to same, March 27, 1830.

[13] F.O., France 27/405. Aberdeen to Stuart, March 5, 1830.

[14] A.E.C.P., Angleterre 631. Laval to Polignac, March 3, 1830.

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be destroyed . . . the King, whose views on this important subject are perfectly disinterested, will concert with the Allies for the purpose of directing what shall be the new order of things." [15] These promises, however, were not taken very seriously. Only a few days later Aberdeen wrote: "Polignac is doubtless aware of the great geographical importance of the Barbary States. In the hands of a more civilized and enlightened Government they could not fail to exercise great influence over the commerce and the maritime interests of the Mediterranean powers." [16]

Polignac continued to evade the direct questions of Stuart. On April 9 the latter wrote to Aberdeen, in answer to constant inquiries as to the state of affairs, that "no definite information can be had from Polignac. He has hinted that the anxiety I manifest upon the subject indicated a feeling of distrust which verbal explanations I had more than once received do not warrant." [17] Polignac expressed surprise that the English should be so concerned when "the Courts of Europe have given the most flattering commendation to the action." However, it was evident that some concession had to be made in order to prevent the English from intervening. Polignac knew that Mehemet Ali's participation was one of their chief concerns and as both d'Haussez and Bourmont, ministers of marine and war respectively, objected to the same thing he decided to drop his ally.[18] This news Stuart hastily reported to London.[19]

The temporary relief afforded by this concession was soon ended. On April 20 there appeared in the *Moniteur* an elaborate plan of the proposed system for the administration of Algiers, once the conquest was completed. Stuart questioned Polignac but the latter would give no satisfaction, not even a denial of the authenticity of the article in question.[20] Polignac

[15] *Ibid.*, Polignac to Laval, March 12, 1830.

[16] F.O., France 27/405. Aberdeen to Stuart, March 23, 1830.

[17] *Ibid.*, 27/408. Stuart to Aberdeen, April 9, 1830.

[18] d'Haussez, *Mémoires*, vol. II, p. 157.

[19] F.O., France 27/408. Stuart to Aberdeen, April 19, 1830.

[20] *Ibid.*, same to same, April 20, 1830.

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lost patience and asked Stuart not to make him disclose things which would render him open to attack in the Chambers.[21] He had for some time felt that Stuart was entirely too aggressive. He asked Laval to complain to Aberdeen, adding that he felt that the English ambassador "had gone out of his way to embarrass the French Government".[22]

Preparations continued unabated at Toulon in spite of the many protests. Polignac tried to satisfy the English by explanations. On May 12 he again assured the English of French good intentions.

> France has two interests [he declared], the one especially concerns France; it is to vindicate the honor of our flag, to obtain redress for the outrages which have been the immediate cause for our hostilities: to preserve our possessions from aggressions and acts of violence to which they have been so often subjected, and to obtain for us a pecuniary indemnity which may relieve us, so far as the state of Algiers will allow, from the expenses of a war which we have not provoked: and the tribute which regards christendom in general; it embraces the abolition of slavery, of piracy and the tribute which Europe still pays the Regency of Algiers.[23]

Marshal Bourmont destroyed all the good effects of Polignac's speech. Just before embarking for Algiers he made a long speech at Marseilles in which he outlined the proposed plan of operations in northern Africa. He even predicted that France would profit greatly by the new acquisitions.[24] Again Polignac was put in the embarrassing position of trying to explain to the English what the commander had said. Rather than disavow what had been said, he dismissed Stuart with the assurance that "in due time sufficient and satisfactory explanations could be made".[25] Polignac had come to believe that English opposition was very largely due

[21] F.O., France 27/409. Same to same, May 10, 1830.

[22] A.E.C.P., Angleterre 630. Polignac to Laval, May 8, 1830.

[23] *Ibid.*, Polignac to Laval, May 12, 1830.

[24] *Le Temps*, May 13, 1830.

[25] F.O., France 27/409. Stuart to Aberdeen, May 14, 1830.

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to jealousy and that in the end England would offer no great resistance to the occupation.[26]

At last the plans were complete and the fleet set sail from Toulon. Aberdeen immediately began to urge the calling of a congress to determine the status of Algiers after the conquest was complete. He sent a definite set of instructions to Stuart which were to serve as the basis for negotiations should Charles X call such a meeting.[27] Polignac, however, continued reticent and refused to commit himself.[28]

On July 12 the *Moniteur* announced the successful occupation of Algiers. General rejoicing followed. But this expression of patriotism did not serve the end which Charles X had hoped to accomplish. His attempt to reorganize the French Chambers while the country was in a state of jollification was a complete failure. The Opposition party continued to grow. Paris arose. The Bourbon monarchy crumbled and fell. On August 8, Louis Philippe became King of France. Charles X was exiled and several of his ministers were imprisoned.

This sudden change of government made the future status of Algiers very uncertain. Louis Philippe was very friendly toward England and sent Talleyrand to foster a closer relationship between the two countries. The ambassador believed in following a cautious policy and urged his government to keep quiet about Algiers. "I have avoided speaking of it and I would be glad if our newspapers observed the same reticence", he wrote.[29] Active opposition in England was considerably lessened by the advent of the Liberals. Earl Grey, the new prime minister, was more occupied with internal problems than with an aggressive foreign policy. He was more interested in the passage of a Reform Bill than in keeping the French out of Algiers.

In France a considerable element favored the retention of the newly acquired territory. Louis Philippe soon evinced

[26] A.E.C.P., Angleterre 630. Laval to Polignac, May 17, 1830.

[27] F.O., France 27/405. Aberdeen to Stuart, June 1830.

[28] F.O., France 27/411. Same to same, July 9, 1830.

[29] A.E.C.P., Angleterre 631. Talleyrand to Molé, November 30, 1830.

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his approval of this view.[30] Not only did France continue to hold Algiers but she gradually began to expand—at first obtaining the other important cities of Algeria, and later creeping toward Tunis and Morocco. England was her first opponent but as years passed and French expansion continued other nations became involved. Thus northern Africa became the scene of European rivalry which really began with the French occupation of Algiers in 1830 and has continued for over a century.

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[30] *Archives Parlementaires*, vol. LXXVI, March 1932.

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BUSINESS AND POLITICS IN THE PERSIAN GULF

THE STORY OF THE WÖNCKHAUS FIRM

THE Historical Section of the British Foreign Office, in its *Peace Conference Handbook* on the Persian Gulf, calls that region "one of the principal theatres of British and German rivalry before the war". Many accounts have been published of the moves on the political chessboard and the worries of diplomats concerning this strategic area of the Middle East, and most of them allude in passing to the activities of a private German firm, Robert Wönckhaus and Company, whose rôle in the great game earned it this mention in the history books. This article will view the prewar politics of the Gulf mainly from the standpoint of that firm.

The concrete experiences of a private business man against the political background of the region throw into sharp relief certain phases of the interaction between private enterprise and international politics. The story to be related shows how a legitimate business with no political intentions becomes entangled in the mesh of suspicion and traditional rivalry between nations, inevitably takes on a political importance, whether it will or no, and finally comes to grief in the cataclysm precipitated, in part at least, by the results of a system under which nations proudly assume the burden and the opportunity of "protecting" just such enterprises of their citizens. This article questions the value to *bona fide* business men like Mr. Wönckhaus of the nationalistic method of encouragement and protection, coupling, as it does under the present organization of world affairs, the interests of private citizens abroad to the whole wide range of national ambitions and bringing them into conflict with the interests and ambitions of other nations.

In the decade of the 1890's an energetic young man named Robert Wönckhaus worked for a Hamburg firm in Zanzibar on the east coast of Africa. Native dhows plied regularly

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between Zanzibar and the Persian Gulf, taking up cargoes of slaves to serve as pearl-divers and bringing back products of the region. Among other things, they once returned with mother-of-pearl shells, practically as ballast. These shells were bought by the Hamburg firm, shipped to Europe, and sold at a handsome profit. Wönckhaus had heard that such shells were thrown away as valueless in the Gulf; he decided to go up there and see what could be done with them. This was in 1897, and he established himself soon afterward at Lingah.[1]

In view of the subsequent belief among the English, French and Russians in the Gulf that he had been sent there with a subsidy from the German government, Mr. Wönckhaus is careful to emphasize the almost accidental circumstances of his entry. "I was completely disassociated from all political aims and all connections with the German or any other government," he says. "Nobody knew about me in Berlin; no one in Germany knew anything about the founding of my firm. It was purely a private, commercial enterprise, and of course I didn't go about advertising my plans. Later, as my business grew and became well known in the region, I suppose German officials heard there was a German merchant operating successfully in the Gulf. But I never at any time had contact with the Foreign Office myself or received or asked for protection—except in one instance. Then I asked for German consular protection and it was not given in a way and measure of which I approved." [2]

It is neither the function nor the purpose of this paper to analyze those bulky tomes of diplomatic dispatches wherein lie revealed the secret aims of foreign offices in their Middle Eastern policies, but at this point we must pause to sketch in the grand lines of the political situation in the Persian Gulf during the period when Mr. Wönckhaus' business was expand-

[1] Information about the Wönckhaus firm is, unless otherwise stated, from a personal interview with Mr. Wönckhaus in Hamburg. He was also good enough afterward to read over and correct a typewritten memorandum of the long conversation.

[2] Abu Musa affair. See below.

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ing. For England, the Persian Gulf was one of the routes to India where compelling reasons of imperial defense dictated that no other power should ever have a foothold. Her traders had established posts along its shores in the seventeenth century, and her imperialists had been interested in its control ever since. The British navy cleared the Gulf of pirates and buoyed and beaconed its waters; a treaty with the Emir of Muscat provided Great Britain with a port from which to defend its entrance; and from time to time British political agents negotiated treaties with the Arab chieftains along its shores.[1] Lord Curzon wrote in his celebrated early book on *Persia and the Persian Question* that he would impeach as a traitor to his country any British minister who might allow Russia to establish a station on the Persian Gulf, and his vigorous action as Viceroy of India when France sought to lease a coaling station at Muscat and again when German plans for the Bagdad Railway pointed toward a terminus at Koweit showed that he was resolutely opposed to admitting any other power to a stake in the region.[2] Though the measures which Curzon's passionate convictions on the question led him to adopt in these instances sometimes impressed the authorities in London as unduly strong,[3] nevertheless, the foreign minister, Lord Lansdowne, announced to the world in 1903 that "we should regard the establishment of a naval base or of a fortified port in the Persian Gulf by any other Power as a very grave menace to British interests, and we should certainly resist it with all the means at our disposal."[4]

[1] E. M. Earle, *Turkey, the Great Powers, and the Bagdad Railway* (New York, 1924), p. 196.

[2] Ronaldshay, *The Life of Lord Curzon* (London, 1928), vol. II, pp. 49-50. "We should strongly deprecate the political rivalry of any European nation in the neighborhood of the Persian Gulf; even though such a situation, while fraught with constant annoyance, might not, as in the case of Russia, constitute a positive menace to the Indian Empire." (The "Curzon Dispatch", Sept. 21, 1899. Gooch and Temperley, *British Documents on the Origins of the War*, vol. IV, p. 362.)

[3] Ronaldshay, *op. cit.*, vol. II, pp. 47, 309-11.

[4] *Parliamentary Debates*, 4th Series, vol. 121, p. 1348; quoted in *British Documents*, vol. IV, p. 371.

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Russia was the great power whose advance toward the Persian Gulf was worrying British statesmen at the end of the nineteenth century.[1] The Russians believed themselves obliged by an imperious necessity of national development to extend their sway southward and eastward toward warm ports and the frontiers of India. The English felt themselves constrained by a no less imperious necessity of defense to resist. Rivalry on the Persian Gulf was one sector of a huge Anglo-Russian conflict on an immense front from Tibet through Afghanistan and Persia as well as in the Far East.

At the time when the Wönckhaus firm commenced its activities the political interests of Germany were beginning to extend through Asiatic Turkey along the line of the proposed Bagdad Railway. This grandiose project for railway construction, planned and financed under the leadership of the *Deutsche Bank,* carried forward with the enthusiastic coöperation of the Kaiser and the German Foreign Office, hailed by German publicists (often to the annoyance of those in charge of its execution) as a potential threat to other powers, as well as a symbol of Germany's rising prestige, was the embodiment of German imperial ambitions. It carried the political interests of Germany toward the Persian Gulf, where they clashed with those of Britain.

As the Wönckhaus firm prospered and developed in this focal point of imperial policies it inevitably took on a political importance. The first recognition of this fact came from the Russians. About 1899 Russia decided to pay more attention to what was passing in the Persian Gulf ports. First she sent out travelers and warships, then opened consulates and trading posts, and soon organized a subsidized maritime service between Odessa and the Gulf.[2] Several governments were

[1] *British Documents,* vol. IV, p. 356 *et seq.*

[2] Some details show the Russian zeal and methods. In 1899 Dr. Chevanowky began to practice medicine at Bushire. He treated free of charge the natives who came to see him, not forgetting to question them about local affairs. His inquiry finished, he returned to Russia. In 1900 several Russian travelers visited the Gulf, two of them sent by the Russian Trade and Navigation Company of Odessa, a high Russian delegation called on the Persian official in charge of the Gulf ports and islands, and Russian gunboats

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establishing consulates along the Gulf about this time, but that of Russia at Bushire was particularly pretentious and well equipped, although there were no Russians in the region. The Russian government was trying its best to construct out of whole cloth a commercial interest in the Gulf. Russia wanted to have interests which could be pointed to as justification for demanding that England discuss Persian Gulf questions with her. "An officer of the Russian Volunteer Fleet, Gorski," says Mr. Wönckhaus, "was sent into the region to build up a Russian trade. He was paid, of course, by the Russian government, and the whole campaign was a government enterprise. It failed, because from start to finish it was such an artificial construction. They shipped in sugar, for instance, for which there was no market, and most of the business they did was conducted at a loss."

"Under these circumstances," Mr. Wönckhaus continues, "the Russian Consul-General, Nicholas Pasek, with whom I was on very good personal terms, came to me. He asked me to take over the Russian trading interests in the Persian Gulf and to build them up through my business connections there, which by this time were quite extensive. I was given to understand that the job would be well paid and would be practically a sinecure. I refused, because I wanted to manage my own business without having to report to anyone and because, after all, though I have never been a chauvinist, I felt myself a German and was not particularly attracted by the idea of working for Russian national ambitions.

appeared. In 1901 a consulate-general was established at Bushire and a consulate at Basra. The consul-general arrived in great pomp with two Mohammedan merchants who were Russian subjects; the aim was to set up a Russian consular and economic organization. There were no Russians there at the time, and the Russian business was at first carried on by a Dutch house, Hotz, which represented the Odessa company. In 1902 a director of a Moscow bank came to study the territory, but no Russian bank dared to set up in southern Persia. In 1903 a regular steamship service was inaugurated by the Russian Trade and Navigation Company and continued until 1914. The Russian government allowed it 200,000 roubles yearly for four round trips between Odessa and Basra. The Russian consular service was also enlarged. (R. Vadala, *Le Golfe Persique*, published by *La Dépêche Coloniale et Maritime*, Paris, 1920. Vadala was a consular officer of France in the Gulf.)

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"Some time later, presumably after receipt of instructions from Petersburg, Pasek approached me again. This time he said, 'We are really very much in earnest about this offer we made you; it is a matter of great importance to us. Our trading people are getting nowhere, whereas you started a few years ago with nothing and have built up a business and connections which make the English firms fear you. If you will agree to represent Russian trade you can name your own terms, and when I say your own terms I mean exactly that—any terms you want. We are determined to have Russian economic interests in the Gulf and we are willing to pay for them.'" Again Mr. Wönckhaus refused, though he supposes that even had he demanded terms which might have yielded him fabulous profits the Russians would have agreed.

It has been said that many men, not two, participate in any conversation: the man that each thinks he is, the man that each believes the other to be, the man that each really is. So in the complex tangle of rival interests and ambitions in the Persian Gulf it is no great wonder if the various governments and their nationals not only worked at cross purposes but sometimes made the situation worse than necessary by misinterpreting each others' motives.

The English in the Gulf at the time, from the Political Resident down to the clerks of commercial houses, believed that the Wönckhaus firm was not merely an energetic business rival but a direct representative of German political imperialism. That its rapid expansion and prosperity were explained by a subsidy from Berlin was considered a matter of universal knowledge.[1]

[1] This notion found expression in such serious historical writings as Sir Percy Sykes' *A History of Persia* (2d ed., 1921, vol. II, pp. 431-33). *The Times History of the War*, published by the London *Times* while hostilities were in progress, contains a chapter which goes into the history of the Persian Gulf in considerable detail and devotes much attention to the activities of the Wönckhaus firm. Its value as unbiased historical narrative is, of course, nil, for it suffers from the distortion common to war-time propaganda, but it was evidently written by a very well-informed person and is not unindicative of the views held by colonial zealots before and during the war. It attributes to the Germans deep-laid plans to upset the British position in the Gulf and then interprets everything in that light. The more trivial or innocent the German activities, therefore, the more insidious. Thus, Germany "quietly

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According to Mr. Wönckhaus, the main circumstance which confirmed the English in their belief that he received a subsidy was his success in a number of business fields where their firms could not make a profit. It is not human nature to ascribe such a defeat to incapacity, and the natural reaction of his competitors was, "Well, of course, *he* can do business there—the German government makes up his losses. We can't expect to compete with a subsidized firm." When Mr. Wonckhaus did not deny such stories—"and why should I deny them?" he asks, "for as long as they believed that there was no profit in my operations I had the field to myself"—the English trading and political community became sure of their truth.

"The real grounds for my success, which was inexplicable to the English except on the supposition of a subsidy, were simple enough," Mr. Wönckhaus relates. "My people and I worked harder than they. Often we would be hard at it in the office while they were out playing tennis, though I liked to play tennis, too, when I had the time. Sometimes we used to send telegrams at three o'clock in the morning in order to have answers the next afternoon. My market information from Europe was nearly always about a day ahead of that of other firms. I applied myself to the language and learned to speak Persian fluently. I maintained close contact with the natives and had native buyers gathering wheat and barley—our chief exports—in the cheapest markets, inland, not just along the coast. Furthermore, I think I knew my wares better than my competitors, for I had worked with them in Hamburg and was familiar with all the types and qualities. Finally, I

established a vice-consulate at Bushire". Wönckhaus and his agents "talked of commerce, but they surreptitiously sought at various points to obtain a territorial footing". The Wönckhaus firm rapidly blossomed into a large and widespread enterprise, established headquarters at Bahrein and opened a new branch at Basra. "The whole Gulf wondered where the money came from. It certainly was never obtained from profits." The "vigilance of the British representatives on the spot foiled the German efforts at every turn". Nevertheless, "British interests in the Persian Gulf were less understood and less rigidly guarded in London", and the British government just before the war initialed some agreements with Germany and Turkey regarding the terminus of the Bagdad Railway which the author of this chapter in the *Times History of the War* considered very unwise.

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was the chief of my own firm, while the English commercial community was made up mostly of subordinates employed by firms with headquarters in London; I could make important decisions on the spot, adapt myself to new conditions, close a contract immediately, while they had to consult London."

The suspicion of British agents against the Wönckhaus firm was strengthened by their growing concern over manifestations of German political and economic interest in nearby regions. The Bagdad Railway project has already been mentioned, and a tendency of German foreign policy to foster commercial interests in Persia proper (in order to create a stake in Persian diplomacy which could be traded for the removal of Russian obstruction to the Bagdad Railway program) [1] did nothing to lessen British apprehension. Presumably German diplomats were not unhappy to see a German firm establishing itself solidly along the Gulf. Although there is no mention of the Wönckhaus firm in the great collection of prewar German diplomatic documents, the welcome accorded early plans of Albert Ballin, Director of the Hamburg America Line and friend of the Kaiser, for the establishment of a steamship service to the Persian Gulf shows a decided interest in that region at the far terminus of the Bagdad Railway.[2]

Whether he wished it or not, the business carried on by Mr. Wönckhaus inevitably acquired a political importance as it grew. Markedly successful, he became known up and down the Gulf, and his agents were everywhere.[3] Such a development in such a region was bound to have repercussions on European politics.

Mr. Wönckhaus explains how political significance came to

[1] A summary of British and German documents on the point is given in Herbert Feis, *Europe: The World's Banker: 1870-1914* (New Haven, 1930), pp. 368-72. *Cf.* also Walter H. C. Laves, "German Governmental Influence on Foreign Investments", doctoral dissertation at the University of Chicago, 1927, pp. 167-176. (An abridgment of Dr. Laves' thesis was published in the POLITICAL SCIENCE QUARTERLY, [December, 1928], vol. XLIII, pp. 498-519).

[2] *Die Grosse Politik*, No. 4978, June 24, 1900.

[3] Mr. Wönckhaus says that in some quarters he was called "The Uncrowned King of the Persian Gulf" and that the English often referred to him as "The Kaiser's Agent". An English officer who was in the Gulf region for many years, however, informs the writer that he never heard such phrases.

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be attached to his business as follows: "Orientals are impressed by force, by power," he says. "They saw me come to the Gulf with nothing at all. They knew me, because I took pains to cultivate good relations with the natives. Then they saw my business grow and saw me get the better of English firms in a number of commodities. They saw my success and the Russian unsuccess. Knowing nothing of European conditions, the power of European nations was typified to them by the citizens of these nations in the Gulf; in fact, they called me in their language 'Germany.' As my business won out over my competitors the natives began to lose some of their fear of England and Russia, and these nations henceforth found it less easy to manage things according to their will. Sometimes native people of great local importance even came to me and asked if I could not have them put under the protection of the German government, in order to interpose a shield between them and the English and Russians. I never accepted or encouraged such offers, said nothing about them to the German consulate, and wrote not a line to Berlin. Nevertheless, the other Europeans, especially the English, believed that such incidental results explained the real motives for my presence in the Gulf. In fairness to the English I ought to say that it must have seemed so to them, looking on from the outside. The effect of the Kaiser's foolish speeches at home—his 'mailed fist' speech to the departing troops at the time of the Boxer uprising, his talk of world empire, and the like—was to heighten this suspicion of my activities." [1]

[1] At Hamburg in 1901 the Kaiser alluded in a public speech to the rôle which Hansa traders might play in expanding the Empire. "As head of the Empire, I rejoice at the departure of each new Hanseate . . . who goes out to foreign parts, looking with his keen, unbiased eye for new points where we may hammer in a nail on which to hang our armor". (Klaussmann, *The Kaiser's Speeches,* transl. Schierbrand [New York, 1903], p. 252.) Living in the Persian Gulf among foreigners of many nationalities, says Mr. Wönckhaus, he was in a good position to observe the effect of such speeches upon the outside world. They did much damage and multiplied the difficulties of German merchants.

A similar effect resulted from the writings of bombastic nationalists like Rohrbach, whom Mr. Wönckhaus denominates "charlatans" and "trouble-makers."

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"Suspicious as my activities may have seemed to the English," continues Mr. Wönckhaus, "the facts are, none the less, that they were of a purely business nature. The German government not only did not support me or subsidize me, but even the legitimate assistance and protection which I might have expected was not always forthcoming. That diplomatic circles in Petersburg, London and Paris discussed my firm and said that the German government was following a far-sighted policy in the Persian Gulf was not my fault. I did nothing to deny these rumors, but a contradiction from me would have changed no one's opinion, and, anyway, the belief that my firm was backed by the government increased my credit and prestige in certain quarters.

"About 1906 I first began to feel that Germany was getting politically interested in the Gulf, and I felt from the first that she was seeking an exchange object which she could trade off with Russia and England against corresponding concessions in the Bagdad Railway affair. I wasn't on the inside and didn't know exactly, but I smelled it in the air. The government never tried to influence me to undertake business projects for political purposes, however; I had no relations of that sort."

It was in 1906, partly at the instigation of Mr. Wönckhaus, that the Hamburg America Line actually established a regular service to the Persian Gulf. The Wönckhaus firm became the agent of the steamship company. The assertion is often encountered in English sources that the Hamburg America Line received a substantial subsidy from the German government for its Persian Gulf service, but this Mr. Wönckhaus denies categorically. "I was connected with all the negotiations, and I know for a certainty that there was not a single penny of subvention", he says.[1] The new line and the Wönckhaus firm

[1] Dr. Friedrich P. Seigart, of the *Institut für Weltwirtschaft und Seeverkehr*, Kiel, author of *Die Subventionen der Weltschiffahrt und ihre sozialökonomischen Wirkungen* (Berlin, 1930), informs the writer that the North German Lloyd received government aid but that the Hamburg America Line received no subsidies for any of its lines before the war.

Huldermann in his biography of Albert Ballin merely mentions the Persian Gulf line in passing and says nothing about a subsidy: the year 1906 "brought about the founding of a line to the Persian Gulf in coöperation with the

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handled shipments for the construction of a portion of the Bagdad Railway.

"Sometime later,"[1] continues Mr. Wönckhaus, "I became Honorary Consul, without pay, representing the German government in Basra. The consulate at Bagdad had recently been established, and the request to me to take charge of the new consulate at Basra came from there. At first I refused. I have never wanted to be a subordinate to anyone; I wanted to run my business and to be completely independent. A second request came, and I refused again. Only at the third request, when it was strongly urged upon me that this was my duty as a German, did I accept, and then only on the specific, written understanding that I was never required to make a report. So far as I know, there was never an exchange of telegrams between the consulate in Basra and the German government."

As stated in the House of Lords by Lord Lansdowne,[2] British policy did not include efforts directed toward the exclusion of the legitimate trade of other powers in the Gulf. It is apparent, however, that the imperial representatives on the spot were inclined to exceed, in their zeal, the official, correct attitude stated in London. It is usually the case, in fact, that political agents in outlying territories chafe at the restraints imposed upon them by a home government which, in their view, almost always shows too much concern for the opinion of rival powers. Consuls of empire tend to favor strong measures, and so it was in this case.[3] A man who has

growing German interests in that part of the world." (Bernhard Huldermann, *Albert Ballin*, [Berlin, 1922], p. 151.)

A study of state aid to shipping made by the U. S. Dept. of Commerce reports that, "The largest of the German Lines, the Hamburg-American Line . . . has developed rapidly without government aid". "For a time it shared with the North German Lloyd a subvention paid for the carriage of mails to China and Japan, but the amounts received in this manner were small." (U. S. Dept. of Commerce, Bureau of Foreign and Domestic Commerce, Special Agent Series No. 119, *Government Aid to Merchant Shipping*, by Grosvenor M. Jones, 1916, pp. 23, 17.)

[1] About 1911.

[2] Cited above.

[3] *Cf.* in *British Documents*, vol. IV, and in Ronaldshay, *op. cit.*, the campaign carried on by Lord Curzon to persuade the London government of the necessity of a more vigorous policy in the Persian Gulf.

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had a distinguished record in the British political service and who was Consul General at Bushire after 1904, then Political Resident in the Persian Gulf from 1909 until 1914, Sir Percy Cox, showed the writer in the course of an interview a copy of a dispatch seized at the German consulate in Bushire after the outbreak of the war. The dispatch had been written by the German consul, Wassmuss, on the occasion of Sir Percy's transfer to India and reported that his going would be a cause for rejoicing from the standpoint of German trade. In personal relations there was no cause of complaint against Sir Percy, but as Political Resident he conceived it to be his duty to do all in his power to hamper the commerce of Germans, for he knew that in this region of weak administration commerce must involve political support. He "saw his ambition to make the Persian Gulf an exclusively English sea endangered by every shipload of barley and every ton of oxide exported" by German firms. This statement of the German consul, affirms Sir Percy, is not only an accurate summary of his point of view as Political Resident but puts it, in fact, quite well, and he regards it as a high compliment.

In the eyes of English officials, anything undertaken by a foreign power or its nationals in the Persian Gulf had political importance. It is easy to understand, then, why they resisted with particular vigor every attempt by Germans to secure concessions which might have had the effect of settling them permanently on a bit of Gulf territory. The Koweit incident has already been alluded to. When the first intimations came that Germany might attempt to secure facilities at Koweit for a Persian Gulf terminus of the Bagdad Railway, and when rumors of a Russian railway concession from Tripoli in Syria to Koweit were abroad, the British government acted promptly. On January 23, 1899, a secret agreement was signed by the Sheikh of Koweit, who pledged himself to cede no territory and receive no foreign representative without the sanction of Her Majesty's Government. Subsequently a British cruiser thwarted an effort by the Sultan of Turkey, backed by Germany, to assert Ottoman sovereignty over Koweit, and the German government was informed that a terminus on the Gulf

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could be had only on the basis of a previous understanding with Great Britain.[1]

Sometime later the Wönckhaus firm tried to obtain from an Arab Sheikh rights to pearl fisheries in the neighborhood of Bahrein; this was prevented by the English.[2] Thereupon the firm is said to have begun negotiations in Constantinople for pearl-fishing rights and for lease of Halul Island, a center of the industry. Again England intervened, fearing that the island might ultimately be used as a coaling station.[3] A third

[1] *British Documents*, vol. I, pp. 333-34.

[2] The writer is informed by an Englishman of long experience in the Gulf that this action was taken on grounds of policy and that any such project, even by a British firm, would have been similarly quashed. "Modern methods" would have resulted in overproduction and destruction of the industry, according to the official view.

[3] *Cf. Times History of the War*, vol. III, ch. 52; Franz Stuhlmann, *Der Kampf um Arabien zwischen der Türkei und England*, Hamburgische Forschungen, 1. Heft, April, 1916; Sykes, *History of Persia*, vol. II, pp. 431-33. The writer is unable to find any mention of these incidents in the diplomatic archives published since the war. The following grossly prejudiced account from the *Times History of the War* is given to show how commercial activities may attain deep political significance in an atmosphere of chauvinist suspicion.

"When the Wönckhaus firm transferred itself to Bahrein its heap of mother-of-pearl shells, bought from the fishermen and piled high outside the dilapidated building which served as an office seemed innocent enough. But German minds a long way off had been thinking ardently about the Pearl Bank. . . . A shadowy structure of Turkish claims was speedily reared" and the Sultan was formally asked to grant to a German syndicate a monopoly of the pearl fisheries of the Persian Gulf. The Sultan, according to the British, had no right to make any such grant. "Yet he was solemnly proceeding to accede to the German request when one sharp word from Great Britain quashed the whole scheme."

Next the Germans tried to get the Sultan to give them a lease to the island of Halul in the center of the Gulf on the Pearl Bank. "The Power that held it would certainly control the pearl fisheries. It was, moreover, quite good enough for a coaling station, and might have been made into an Oriental Heligoland." "Again a British word in season stopped this little enterprise, but still the Germans persisted."

On one occasion the Bahrein branch of the Wönckhaus firm very nearly became the scene of the "international incident" which the writer in the *Times History of the War* claims the Germans were looking for. Sheikh Isa, of Bahrein, was having trouble with a turbulent nephew, who had a following of truculent retainers. "One of these followers violently assaulted one of the Wönckhaus coolies, and directly afterwards one Bahnsen, an assistant to Wönckhaus, who was badly hammered. The incident sounds paltry, but

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incident, which could easily have attained major importance, occurred on the Island of Abu Musa.

An English firm, F. C. Strick and Company, had contracted for and was working a deposit of iron oxide on an island called Ormuz. Mr. Wönckhaus looked about and found a similar deposit, not quite as good, but worth working, on the nearby island of Abu Musa. The Sheikh of Shargah, whose territory it was, had conceded to three Arabs [1] the right to exploit the iron oxide of Abu Musa, and in 1906 two of them transferred their rights to the Wönckhaus firm, which then prepared to start operations. At this stage the Sheikh canceled the concession, influenced by the English,[2] who had a treaty dating from 1892 with him and other Arab chieftains to the effect that he would enter no relations with any government but Great Britain and would dispose of none of his land to any other power. The French vice-consul, Vadala,[3] writes that the red-oxide of Abu Musa would have made an ideal freight for the steamers of the Hamburg America Line, which arrived in the Gulf laden with construction material destined for the last section of the Bagdad Railway but lacked return cargoes. This was one reason why the English were determined to prevent Wönckhaus from exploiting the deposits. There may have been more weighty reasons, however, including the apprehension that if Abu Musa proved to be commercially valuable claims to sovereignty might be made by Persia.

The Wönckhaus firm took no notice of the Sheikh's revocation of the concession. In October 1907 the British warship *Lapwing* appeared at Abu Musa towing a number of sail-

it was just one of the pretexts for interference for which Germany was eagerly watching. She was given no chance. Within three days a British gunboat arrived, bearing the British Resident in the Persian Gulf. A sum of £66 was instantly paid as compensation to the bruised Bahnsen, and the ringleaders in the disturbance were publicly flogged and then banished."

[1] "Two of the men, father and son, resided at Lingah, and it is supposed that they applied for the concession on German instigation." (*Times History of the War, loc. cit.*)

[2] The Sheikh had nothing but negative opinions on such matters, which he did not understand, says Sir Percy Cox. He was open to persuasion by English or Germans.

[3] *Op. cit.*

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ing boats loaded with three hundred of the Sheikh's armed followers. The warriors disembarked, seized the workers employed by Wönckhaus, and removed them to Lingah. Two hours later, when a representative of Wönckhaus arrived, he was fired upon, but luckily not killed, by these same native warriors.[1]

There was a cry of indignation in the German press.[2] Mr. Wönckhaus protested to the German government, which passed on his protest to the British government through the Embassy in London. According to Mr. Wönckhaus, however, the German Foreign Office induced him to lower his claims for compensation below the amount to which he believed himself justly entitled, made his original protest much milder, and did not press the matter very energetically.[3] The question dragged on, was postponed and repostponed, until finally in 1914, some months before the outbreak of the war, the British government agreed in principle that Wönckhaus was entitled to compensation.[4] The determination of the actual amount

[1] Interview with Mr. Wönckhaus. Also: *Times History of the War;* R. Vadala, *op. cit.;* Franz Stuhlmann, *op. cit.;* Sykes, *op. cit.*

[2] "The *Cologne Gazette* was mild and said that the German purpose was commercial. The *Neuste Nachrichten,* rather more severe, spoke of the 'incomprehensible violation of German rights.' The *Berliner Tageblatt* grew a little violent, and announced that Great Britain was trying to undermine German prestige and to demonstrate her own supremacy. It said that the English 'seem to have had the intention to show Germany that she can do nothing in the Middle East without Great Britain's consent,' . . . declared that 'commerce and politics can no longer be divided,' and that Germany could only attain commercial success by 'energetic political action.' . . . The hubbub was reflected in the London press, but it soon ceased." (*Times History of the War.*)

[3] At the India Office in London the writer was informed that the papers on the Abu Musa affair and the Wönckhaus claim for compensation cannot be made available, but an official very kindly volunteered to look them through and to answer what questions he could without violating official discretion. His impression from a reading of the documents was that Germany had done everything proper in pushing the claim and had not been at all soft about it.

[4] This may have formed part of the general settlement of outstanding Anglo-German differences relating to the Bagdad Railway and other subjects which was negotiated on the eve of the war. (Letter to the writer from von Kühlmann, who was secretary of the German Embassy in London in 1914.) Dr. von Kühlmann says he remembers that the friction connected with the

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was further postponed. Then the war came, and in the end Wönckhaus received no compensation at all.[1]

The checks administered to the Germans at Koweit, Bahrein, Halul and Abu Musa did not discourage the "politico-commercial" firm of Wönckhaus, writes the French vice-consul, Vadala.[2] It turned its interest to the region of the Karun River and set up a steamboat service in competition with the English firm of Lynch Brothers which lasted until 1914.

> On the whole, however, the Wönckhaus firm was reduced to occupying itself with commerce as such—the import and export business in the large ports of the Persian Gulf. It also had a river transportation service on the Karun and a maritime service from Hamburg to Basra, but it was never able to succeed with its special enterprises because the preponderant influence of the English with the Arab sheikhs always crushed the politico-economic plans of Wönckhaus, who, for that matter, was out not only to make money but also to supplant the prestige of the English.

Thus, continues this French observer, German dreams had to remain unfulfilled, and during the war all German influence was driven out of the Gulf by the British.

Wönckhaus himself maintains to the end that his actions in

Wönckhaus firm formed a part of his diplomatic work from time to time, but he cannot recall the matter in detail, since a huge mass of such episodes passed through his hands.

The Abu Musa affair is not mentioned in the collection of *British Documents on the Origins of the War* nor in *Die Grosse Politik*.

[1] Interview with Mr. Wönckhaus. The India Office official who looked through the papers informed the writer that apparently some sort of compromise was reached just before the war, Mr. Wönckhaus claiming that he ought to have compensation at least for the iron oxide he had already mined and lost. This official agreed that to accept the version given by Mr. Wönckhaus and used above in the text "would not be far off the mark."

Sykes in his *History of Persia* is mistaken when he says that though there was a storm in the German press the position was too weak to be defended by the Berlin Foreign Office and was dropped after a formal protest. Likewise, the *Times History of the War* comment that "the German case had not a leg to stand on" is inaccurate. The *Peace Conference Handbook* (No. 76, Persian Gulf) prepared by the Historical Section of the Foreign Office says that "the question was still unsettled on the outbreak of the war in 1914."

[2] *Op. cit.*, p. 36.

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the Gulf were inspired purely by commercial, not by political, motives, and that the story widely believed in the Gulf and printed in some British newspapers to the effect that Germany was trying to get a footing on the island of Abu Musa which might serve as a sort of base for future German operations was all nonsense. Nevertheless, as it often happens in politics that beliefs, even if mistaken, are just as important as facts, the operations of the Wönckhaus firm actually acquired great political importance and did as much as any other factor outside of the Bagdad Railway itself to make the Persian Gulf "one of the principal theatres of British and German rivalry before the war."

The writer believes that we can accept Mr. Wönckhaus' version of his purposes and activities in the Gulf as substantially accurate. Since the first draft of this paper (which included the preceding sentence) was written, a recent book by Lt. Col. Sir Arnold T. Wilson has come to hand, *Loyalties, Mesopotamia 1914-1917, A Personal and Historical Record.*[1] Its unimpeachable evidence corroborates in remarkable fashion Mr. Wönckhaus' own contention regarding the non-political nature of his business and thereby tends to argue still further for the reliability of the Wönckhaus testimony as a whole, already found accurate on every point that the writer had been able to check. Sir Arnold Wilson writes:[2]

> This is perhaps the place to refer briefly to the activities in the Persian Gulf and Mesopotamia of enemy firms. Candler[3] insists that the firm of Wönckhaus existed primarily for anti-British intrigues and the furtherance of German military and political rather than commercial objects, and that its representatives were trained intelligence agents. This was the official military view at the time, but it was not well grounded. It is true that Herr Harling, the young agent of Wönckhaus at Bahrain, sent accurate details of the composition of the Indian Expeditionary Force to his people at Basra and Bushire by

[1] Oxford University Press, 1930.

[2] Pp. 74 *et seq.*

[3] Edmund Candler, *The Long Road to Bagdad* (London, 1919), vol. I, pp. 253, 256, vol. II, p. 110.

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dhow four hours after its arrival. Yet what British merchant would have done less, and are we really supposed to believe that the "accurate details" were secured at Bahrain? . . . Harling's colleagues at Bushire, Mohammerah, and Ahwaz were likewise doing no more than their obvious duty as patriotic citizens, and less than many of our own compatriots were doing all over the world. The fact that they had, like all Germans, undergone the usual military training before going abroad doubtless gave point to their observations and discretion to their reports; but *a careful examination of the voluminous records of the firm's various branches lent no colour whatever to the supposition that its objects were other than commercial.*[1] Indirectly, perhaps, through the Hamburg-Amerika Company, of which they were the local agents, they received a subsidy from the State, and even this is by no means certain.

Like a host of other business men scattered over the face of the earth, Mr. Wönckhaus seems to have been interested in doing a profitable business, expanding his firm, becoming a great merchant—not in politics. Why, then, did he eventually find his enterprise a "politico-commercial" institution involved in one of the many international conflicts which led up to the World War? He himself thinks that the whole story shows how unskilfully, with what "*Dummheit*", world politics was conducted before 1914. "I realize now that my firm actually had a small part in the origins of the war, but that was not at all necessary. In the first place, when the German consular representatives in the Gulf noticed that the British were suspicious of German motives there, why did they not report the fact to Berlin? Or, if Berlin was informed, why did the Foreign Office not come to a frank understanding with England? In the second place, the British government did not seek to clear the question up. Why did not some English representative come to me and ask me if the rumors that I was subsidized by Germany were true? I should have answered 'No', immediately, and if they were not satisfied I should have been willing at that time to reorganize my firm, making it into an English company."[2]

[1] Italics by the present writer.

[2] Mr. Wönckhaus says that he had much of his capital from England and

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In the opinion of the writer, the question with which we have to deal is not that of assessing blame for the friction which developed in the Persian Gulf. Like so many other episodes in the origin of the war, this was not a simple case of right against wrong.[1] Sir Percy Cox was right. In regions of weak administration commerce does involve political support, and, given the international system under which he worked, German commerce in the Persian Gulf was a potential menace to British interests. Wönckhaus and the Hamburg America Line and the builders of the Bagdad Railway were also right. Why should they not invest their energy and their capital and initiative in developing the economic possibilities of the Middle East? And who will say that on the accepted standards of international conduct Britain was wrong in guarding most jealously all approaches to India, or Germany wrong in endeavoring to remove political obstacles to the railway enterprise of her citizens? It was the system at fault, the whole complex of nationalistic responsibilities and prerogatives with reference to the economic enterprises of citizens abroad. So long as this system, these responsibilities and prerogatives, endure unchanged, the operations of all the Wönckhauses of the world in all the Persian Gulfs of the world will be occasions of international friction, and the failure of men to adapt their political systems to the situation created by world-wide economic connections will continue to produce so-called "economic" causes of war.

EUGENE STALEY

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did as much trade with England as with Germany. From 1900 on he had a European of British nationality in his employ at Lingah, and a second man of British nationality was an employee of his at Mohammerah-Ahwaz. He says he would not have employed these men had there been any truth in the notion that he was "The Kaiser's Agent" or subsidized by the German government.

[1] "It would have been altogether too simple, both for the living and for history, had truth been one single truth and had it fought against falsehood only. There were, however, two truths and two honours fighting each other. And the battlefield was strewn with the bravest and best." From *Quiet Street* by Michael Ossorgin (New York, 1930), p. 293.

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THE *AMISTAD* CLAIMS: INCONSISTENCIES OF POLICY

IT may be expected that the recent agreement effected by the United States and Spain, to arrange for a consideration of reciprocal claims pending between the two governments,[1] will result in a reëxamination of two particular sets of such unadjusted claims now almost a century old. The *Amistad* claims, held by Spain against the United States, arose as the result of a series of events beginning in 1839. Six years later the United States had occasion to charge the government of Spain with the responsibility of settling for alleged damages which later were known as the "Cuban claims". From the date of its origin until the outbreak of the American Civil War each of these questions was the subject of continual diplomatic negotiations. In the end, as will be shown, the failure to settle the first was largely responsible for the defeat of the second. It is with the repeated efforts that were made to adjust the *Amistad* affair, however, that this paper is primarily concerned.

It seems unnecessary to relate in any detail here the circumstances which gave rise to the Spanish claims in question. These have been told in a number of places.[2] Briefly stated, the facts are as follows.

On or about June 28, 1839 the Spanish schooner *L'Amistad* sailed from Havana for the port of Puerto Principe, Cuba, under the command of the owner and captain Don Ramon Ferrer. On board the vessel besides sundry articles of

[1] *Executive Agreement Series* (Washington, 1931), No. 18.

[2] See, for example, Henry Wilson, *History of the Rise and Fall of the Slave Power in America* (3 vols., Boston, 1874-1877), vol. I, pp. 456-466; J. A. Howland, "The Amistad Captives", in *Proceedings* of the Worcester Society of Antiquity for 1886 (Worcester, 1887), pp. 61-74; W. H. Smith, *A Political History of Slavery* (2 vols., New York and London, 1903), vol. I, pp. 53-60. Contemporary accounts are found in *A History of the Amistad Captives*, comp. by J. W. Barber (New Haven, 1840); *Book of Pirates*, comp. by H. K. Brooke (Philadelphia, 1841), pp. 184-196. Official correspondence on the question is printed in 26th Cong., 1st Sess., *House Doc.* 185; 26th Cong., 2d Sess., *Sen. Doc.* 179.

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merchandise were two other Spanish subjects, Don Jose Ruiz and Don Pedro Montes, with fifty-odd negroes whom they claimed as slaves and for whom they had procured passports as such from the governmental authorities at Havana. After a few days at sea the negroes rose in revolt, killed the captain and cook of the vessel, put the small crew adrift, and ordered Ruiz and Montes to sail for Africa. In their ignorance, however, the negroes were deceived, and the vessel was steered into American waters. On August 26 following, it was discovered off Montauk Point, Long Island Sound, by Lieutenant Thomas Gedney, commanding the United States brig *Washington,* who took the negroes to New London, Connecticut, where, charged with murder, they were committed to jail on a warrant issued by the United States district judge. The Spanish minister at Washington, A. Calderon de la Barca, immediately demanded that the vessel and cargo be surrendered in accordance with the treaty of 1795 between the United States and Spain,[3] and that the blacks be sent to Cuba that they might be tried under the laws they had violated.

This, however, was not to be the case. Before the executive branch of the government had taken any definite action the whole question had become somewhat complicated because of

[3] Reference was made particularly to the 8th, 9th, and 10th articles of this well-known treaty. They are here summarized as follows:

8th. Should the subjects or inhabitants of either party with their public or private shipping be forced, whether by stress of weather or by pursuit of pirates or enemies, to seek shelter in any of the ports, bays or rivers of the other party, they shall be received and treated with all humanity, enjoying "all favor, protection, and help"; and they shall be allowed to provide themselves with the provisions necessary to continue their voyage, departing "when and whither they please" with no interference.

9th. All ships and merchandise of whatever nature which may be rescued from pirates shall be brought into the ports of either state, cared for, and restored entire to the true owner, "as soon as due and sufficient proof shall be made concerning the property thereof".

10th. When any vessel of either party shall be wrecked, foundered or damaged on the coasts of the other, the unfortunate citizens or subjects shall receive the same assistance due to the "inhabitants of the country where the damage happens", and shall pay the same charges and dues.

See *Treaties, Conventions, International Acts, Protocols and Agreements,* comp. by W. M. Malloy (2 vols., Washington, 1910), vol. II, pp. 1643-1644.

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the various suits that were filed with the judicial. In the Federal district court of Connecticut Gedney and associates libeled the vessel, cargo and the negroes for salvage. Ruiz and Montes filed libels for the restitution of their part of the merchandise and the negroes; while certain interested Cuban merchants filed claims for their portion of the cargo. For the United States, District Attorney W. S. Holabird, setting forth the Spanish demands, filed suit for the restoration of the vessel, cargo and the negroes unless it was determined that the latter had been unlawfully held as slaves. In that case they should be removed to Africa. Meanwhile certain northern abolitionists whose sympathy had been aroused by the plight of these blacks appointed a committee consisting of S. S. Jocelyn, Joshua Leavitt and Lewis Tappan to raise funds and conduct their defense. Acting then through their counsel, S. P. Staples and Theodore Sedgwick, Jr., the negroes filed answer alleging that, having been kidnaped in Africa and taken to Cuba in violation of Spanish law, they had never been held in legal bondage. Friends of the *Amistad* captives, moreover, caused the arrest of Ruiz and Montes in New York on a charge of enslaving free Africans, for which they were held for trial in that state.

Felix Grundy, the attorney-general, held that the whole case fell within the provisions of the treaty of 1795, and advised the delivery of the *Amistad,* its cargo and the negroes to the Spanish government. It was his opinion that the United States would not be justified in investigating the papers of the vessel in order to determine the true status of the negroes. Should they be returned to their alleged owners, on the other hand, they would have no occasion to assert their claim to freedom. Moreover, if they had broken Spanish laws, he stated, they should be surrendered to the proper authorities so that they might not escape punishment.

The Van Buren administration accepted this general view of the matter; and the Spanish minister, repeatedly insisting that the courts of the United States did not have jurisdiction over crimes committed against Spanish law, on board a Spanish vessel, and in Spanish waters, considered that the questions

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involved were for the executive alone to handle. Yet the proceedings which had been instituted in the district court were uninterrupted. A decision was rendered in January 1840. After hearing the evidence presented the court held that the negroes had been but recently imported into Cuba contrary to Spanish law, that the passports secured for their passage on the *Amistad* had been fraudulently obtained, and that they thus did not legally belong to Ruiz and Montes. It directed, therefore, that they should be transported back to Africa. The vessel and the cargo were awarded to their owners, subject to the claims of salvage to one-third of their value payable to Gedney and associates. On appeal this decree, reserving the question of salvage on the cargo, was approved *pro forma* by the circuit court. Eventually the case reached the Supreme Court of the United States, where the final trial began the following February. In addition to the regular counsel Representative John Quincy Adams, who both before and after this time exhibited considerable interest in the affair, prepared and delivered a four-hour speech in behalf of the *Amistad* captives. The decision handed down on March 9, 1841 affirmed that of the circuit court, except that it declared the negroes free and ordered that they be set at liberty within the United States.[4] The Spanish government, of course, refused to accept this solution of the question; and, as will be noted, it immediately put in claims for indemnification.

The situation was intensified further by two less well known occurrences that grew out of the controversy. One was the

[4] The *Amistad* case had aroused considerable interest throughout the nation. Besides having undertaken their defense and providing educational and religious training for them, ardent friends of the cause of the negroes now made it possible for them to return to Africa. Accompanied by teachers and missionaries, they arrived at Sierra Leone in January 1842, on their way to the Mendi country. See *Niles Register*, October 30, December 4, 1841; March 5, April 23, 1842. Sympathy for these Africans had also been aroused in England. See sundry letters to and from Lewis Tappan, in *A Side-Light on Anglo-American Relations, 1839-1859, Furnished by the Correspondence of Lewis Tappan and Others with the British and Foreign Anti-Slavery Society*, ed. by A. H. Abel and F. J. Klingberg (Lancaster, Pa., 1927), pp. 60-63, 69-70, 79-80, 83-88. For an official expression of the attitude of the British government in opposition to the Spanish demands incident to the case, see H. S. Fox to John Forsyth, January 20, 1841, in 26th Cong., 2d Sess., *Sen. Doc.* 179, pp. 27-28.

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final disposal made of the vessel and the cargo. In October 1840, while the appeal was still pending, pursuant to the order of the district court the *Amistad* was sold in order to satisfy the claim of the salvors. The proceeds were withheld from them until after the decree had been confirmed by the Supreme Court; but the cargo was sold at the same time as the vessel. The second event had to do with the slave Antonio who was captured and held along with the other negroes on the schooner. The district court ordered that he, the *bona fide* property of the murdered captain, be restored to the Spanish authorities. No appeal was taken on this point, but Antonio was held as a witness until the final decision was rendered in connection with the other blacks. Then he was induced by his abolitionist friends to go to New York where he was secreted from the marshal who followed in pursuit.[5] Apparently no later serious efforts were made by the United States to recapture and deliver this slave to the Spanish minister.

Enough has been said to show that the Van Buren administration had favored compliance with the Spanish demands with respect to the *Amistad*. In order to understand the events which followed, however, as well as to get a complete picture of the whole series of negotiations related to the case, it is necessary now to note specifically the attitude of the executive department before the matter was reviewed by the courts. A few points will suffice for this purpose.

There is no doubt but that Secretary of State John Forsyth, believing that the case did come within the provisions of the treaty of 1795, expected at first that it would be settled exclusively through the ordinary diplomatic channels. After receiving the protest of the Spanish minister and being advised of the court proceedings that were being instituted, he informed Attorney Holabird that the president would soon make a decision on the question; and he instructed the attorney at

[5] See *Hartford Times*, October 31, 1840; H. D. Gilpin, attorney-general, to the secretary of the treasury, December 14, 1840, in 31st Cong., 2d Sess., *House Doc.* 55, pp. 1371-1372; Daniel Webster to P. A. Argaiz, April 3, 1841, MSS., Department of State, Notes to the Spanish Legation, VI; Argaiz to Webster, April 5, April 11, September 24, 1841, in 27th Cong., 3d Sess., *House Doc.* 191, pp. 2, 3, 7-11.

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the same time to take care to see that no action of any "judicial tribunal places the vessel, cargo, or slaves beyond the control of the Federal Executive." On November 19, 1839 Forsyth sent to Pedro Alcantara Argaiz, the successor of Calderon at Washington, a copy of Attorney-General Grundy's opinion which, he assured the minister, had been approved by the president and his cabinet. In a regular despatch, dated December 12 following, Forsyth explained that conditions "beyond the control" of his department had operated to delay the disposal of the matter, but expressed the opinion that they would not affect the ultimate course which the government should see fit to adopt. The final settlement of the case, he wrote, would emanate from "no other source than the Government of the United States." If the judicial authorities had been employed in conducting an investigation it was because the judiciary was a "portion, though an independent one, of that Government." In this same note Forsyth, replying to a protest on the subject, denied that under the treaty of 1795 Spain could make a valid complaint against the Federal government for the arrest of Ruiz and Montes on a civil suit in New York. Yet he added, significantly enough, that with the exception of this "vexatious detention" of these men (who he had said were the victims of intrigue) everything that had been done by the United States in the *Amistad* affair had been based on the assumption that they "alone were the parties aggrieved; and that their claim . . . was founded in fact and in justice." [6]

The secretary thus confidently expected that the policy of the Department of State would be upheld by the district court. Acting upon that assumption, and in accordance with the request of the Spanish minister, he ordered that a vessel of the United States be stationed off the port of New Haven for the purpose of transporting the negroes to Cuba, providing the decision of the court met his expectations. In such an event the marshal of the district was directed to deliver the prisoners

[6] John Forsyth to W. S. Holabird, September 11, 1839, in 26th Cong., 1st Sess., *House Doc.* 185, pp. 39-40; Forsyth to Argaiz, December 12, 1839, *ibid.*, pp. 26-30; Argaiz to Webster, June 27, 1842, in 28th Cong., 1st Sess., *House Doc.* 83, pp. 2-21.

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to the commander of the vessel, unless an appeal shall "actually have been interposed." Arrangements were made to forward the records of the court to the Cuban authorities to be used at their discretion in any judicial proceedings that might be adopted to determine the true status of the captives. Lieutenant Gedney and one of his subordinates, R. W. Meade, were also directed to prepare to make the voyage in order to give the officials of the island the benefit of their general knowledge of the whole affair.[7]

When these plans were suddenly interrupted by the decision of the district court Forsyth immediately instructed Holabird to make an appeal to the next higher tribunal.[8] It was also by his direction naturally that an appeal was later taken to the Supreme Court. His department refused, however, to take any steps contrary to the verdict of the lower courts while the case was still pending.[9] What would have been his official attitude following the final judicial decision is, of course, unknown, for when that was rendered Forsyth, with the current change of administrations, had just been supplanted at the Department of State by Daniel Webster.

The new Whig administration accepted the verdict of the Supreme Court as a matter of course, and assumed that it would end the controversy once and for all. Spain's dissatisfaction, however, was expressed immediately upon the receipt by its representative at Washington of a copy of the decision. This original complaint was ignored. Whereupon, on May 27, 1841, Argaiz reminded Webster that the Spanish government had consistently protested against the intervention of the courts in the *Amistad* affair. This note indicated, too,

[7] See Memorandum, the Department of State to the secretary of the navy, January 2, 1840, in 26th Cong., 1st Sess., *House Doc.* 185, pp. 67-68; Forsyth to Argaiz, January 6, 1840, *ibid.*, pp. 37-38; the secretary of state to the secretary of the navy, January 7, 1840, *ibid.*, pp. 68-69; Forsyth to Holabird, January 12, 1840, *ibid.*, p. 56.

[8] January 17, 1840, in 26th Cong., 1st Sess., *House Doc.* 185, p. 57. The attorney previously had been given similar instructions, in case the verdict proved to be unfavorable. See Forsyth to Holabird, January 12, 1840, *ibid.*, p. 56.

[9] See Forsyth to Argaiz, May 9, 1840, in 26th Cong., 2d Sess., *Sen. Doc.* 179, pp. 11-12.

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that Argaiz had interpreted Forsyth's statement to the effect that the final disposition of the case would emanate from no other source than the "Government of the United States", to mean that it would be handled exclusively by the executive branch of it.[10] A third dispatch two days later brought the formal demand for indemnity.

> . . . Aware [Argaiz wrote] . . . of the embarrassed situation of the actual administration, and that a change of circumstances has rendered it impossible now to effect the fulfilment of the treaty, the undersigned believes he ought to demand, as he now does:
>
> 1. Indemnification for the vessel called 'Amistad'.
> 2. Indemnification for her cargo, including the negroes found on board.
> 3. Indemnification for the losses and injuries suffered by . . . Don Pedro Montes and Don Jose Ruiz, during their unjust imprisonment.
> 4. The assurance that the course given this affair shall never serve as a precedent in analogous cases which may occur.[11]

More than three months had elapsed before Webster, at first evidently unfamiliar with the details of the whole affair, replied to these demands. His answer was a carefully worded argument of which only a bare summary need be given here. It had been supposed, he stated, that the Spanish minister realized that the president had no power to question, alter or review a decision of the Supreme Court, a tribunal wholly independent of the executive, whose decrees were conclusive and final. The courts, being guided by the treaty of 1795, the law of nations and the law of the United States, had passed upon the questions involved only after careful and deliberate investigation. He could not see, he said, how the treaty had been violated. Under the circumstances the justice of the matter of the salvage was indisputable, he felt, although he erroneously stated that the vessel and cargo had been returned to their owners. It had been proved, he asserted, that the

[10] Argaiz to Webster, March 17, May 27, 1841, MSS., Dept. of State, Notes from the Spanish Legation, XI.

[11] Argaiz to Webster, May 29, 1841, in 27th Cong., 3d Sess., *House Doc.* 191, p. 4.

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negroes found on the ship were at no time legal slaves. Even if they had been, he added, by their acts of murder and escape from bondage they would have become assassins and pirates for whose delivery to Spain the treaty in question did not provide. For any losses and injuries inflicted upon Ruiz and Montes within the United States, moreover, the government offered reparation through its courts which stood open to them. Finally, Webster declared that if the United States were conscious of having inflicted injury upon either a private individual or a powerful nation indemnification would be readily granted. Yet the question of the existence of such injury "must be determined by the Government itself".[12]

In view of the policy adopted by the previous administration Argaiz considered himself in a particularly favorable position to engage in the debate with regard to the jurisdiction of the courts in the *Amistad* affair. In his next note, dated September 24, he took the occasion again to remind Webster of Forsyth's statement on that point, and also cited Grundy's opinion to substantiate his argument. The Spanish government, he said, could not acquiesce in an open violation of the treaty, which in this case would result from an inability of the president to alter the decision of the Supreme Court. If such be the relation between these two branches of the government, he inferred, treaties "should be concluded with the judicial power."

Turning then to other phases of the controversy, Argaiz characterized the examination of the ship's papers by the courts as a recognition of the right of search, which, he said, had not been authorized by any government, and had been refuted by writers of public law, including "the distinguished jurist Mr. Grundy." He informed Webster that instead of having been restored to their owners the vessel and cargo were

[12] Webster to Argaiz, September 1, 1841, in 27th Cong., 3d Sess., *House Doc.* 191, pp. 4-7. Prior to writing this dispatch Webster had called upon John Quincy Adams for information pertaining to the *Amistad* episode. Adams sent him R. S. Baldwin's argument before the Supreme Court, and advised Webster "not on this occasion to truckle to Spain". See *Memoirs of John Quincy Adams*, ed. by C. F. Adams (12 vols., Philadelphia, 1874-1877), vol. X, pp. 469-470.

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sold without their or his knowledge at the time. Finally, Argaiz admitted that the treaty of 1795 did not provide specifically for the extradition of assassins and pirates, but insisted that such was the evident intention of the framers in circumstances such as these.[13]

Webster's position remained wholly unchanged; and he saw no advantage in continuing the discussion. Thus it was after nine months, and then only upon the request of the Spanish representative, that he answered Argaiz's foregoing note which he considered in the light of a mere protest. His reply, an attempt to convince Spain that the United States had done nothing "not in strict accordance with the principles of public law and the practice of nations", and nothing that might be considered as an "encroachment upon Spanish territories, or visiting and searching Spanish vessels", was for the most part a résumé of the whole case in which few fresh arguments were presented. He did assert that in the letter of December 12, 1839 Forsyth had not meant to convey the impression that the "Executive" would decide the question. His predecessor had said the "Government" of the United States, which Webster stated, included the Supreme Court. He added that in the United States and other nations where the judiciary was an independent branch of the government it was a common practice to submit to judicial decision questions arising under treaty stipulations. He explained that the *Amistad* and its cargo had been sold simply to satisfy the claims of the salvors, as was the practice among courts of admiralty when the owners were not present to pay the amounts awarded as salvage. He insisted that in the absence of specific extradition agreements between them the United States was in no way obligated to deliver up to Spain criminals and fugitives from justice. In conclusion, Webster expressed the hope that Argaiz would "perceive that this Government has violated none of its obligations to Spain, or done injustice in any manner whatever, to any Spanish subject." [14]

[13] Argaiz to Webster, September 24, 1841, in 27th Cong., 3d Sess., *House Doc.* 191, pp. 7-9.

[14] Webster to Argaiz, June 21, 1842, in 27th Cong., 3d Sess., *House Doc.* 191, pp. 11-15.

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Webster's communication brought an immediate reply from Argaiz. Yielding, as he said, to the voice of duty which compelled him to "pursue this correspondence notwithstanding the decision of the Supreme Court", the Spanish minister on June 27, 1842 addressed the secretary of state a long and elaborately written note. In it he also gave a résumé of the whole case, repeated former protests and arguments, quoted various concessions and admissions to the Spanish point of view during the preceding administration, and, finally, insisted upon a prompt answer to the demands for indemnity. In addition, Argaiz drew a striking parallel between his protests to the United States in regard to the *Amistad* episode and those of Webster to Great Britain in connection with the then recent *Creole* affair. Disregarding the fact that the courts had decreed that the *Amistad* negroes had never been in legal bondage, while those of the *Creole* were *bona fide* slaves, Argaiz declared that he and Webster agreed on the principles; that Webster dissented only in their application to the case of the *Amistad*. On this same subject, he added:

> Before the occurrence [of the *Creole* case], the Government of Her Majesty might have entertained the illusion that the . . . United States, in delaying to accede to its just claims, had been actuated, perhaps, either by reasons of a political character, and peculiar to the country, or from an erroneous method of considering the question. At the present day, however since the doctrines maintained through the medium of Mr. Webster, are known, there does not and cannot exist the smallest doubt upon this matter. Both Governments profess the same doctrines; both are altogether agreed upon principles.

Argaiz said that he had been instructed by his government to ask again specifically and distinctly for the admission or denial of the four points listed in his note of May 24, 1841. Apparently, too, he was quite confident of the outcome; for in order to facilitate the United States, he said, "in ascertaining the total of the sum claimed", he sent with this note various documents listing the value of the vessel, the cargo owned by Ruiz and Montes, the worth of the "*negroes when purchased in*

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Havana", and the value of the slave Antonio. The total amounted to $47,405.62½.[15]

Webster declined to answer this quasi-ultimatum, and with good reason. It appears that in the summer of 1842 the Spanish government instructed its representative in Washington and the Cuban Intendant that pending a settlement of the *Amistad* claims the semi-annual payment due from Spain to the United States under the convention of 1834 should be withheld. At least Webster received from the Cuban official word which led him to believe that such was the case; and he at once inquired of Argaiz if it were true. Receiving only a vague and elusive reply from that source, Webster on August 29, 1852 directed Washington Irving, the American minister at Madrid, to sound out the Spanish secretary of state and foreign affairs on the subject. At the same time he informed Argaiz that the United States would not consent to connect the acknowledged treaty debt with the unacknowledged *Amistad* claims; and that until he learned if this had been attempted he would not continue further discussion of the latter question. The dispatch to Irving was three months in transit. By the time Webster received a reply stating that the American minister had been assured that Spain had never considered allowing the matter of the pending claims to interfere with the payments on her just treaty debt,[16] the attempts to settle the *Amistad* controversy had begun to assume a different aspect.

Although formally unanswered, Argaiz's note of June 27, 1842 was not ignored. Webster told him, according to the

[15] Argaiz to Webster, June 27, 1842, in 28th Cong., 1st Sess., *House Doc.* 83, pp. 2-21.

[16] Webster to Argaiz, August 16, 29, 1842, MSS., Dept. of State, Notes to the Spanish Legation, VI; Webster to Washington Irving, August 29, 1842, MSS., Department of State, Instructions, Spain, XIV; Irving to Webster, December 5, 1842, MSS., Dept. of State, Dispatches, Spain, XXXIV. T. C. Reynolds, secretary of the American legation at Madrid, had occasion in 1847 to study carefully various items of correspondence on the *Amistad* negotiations for the period in question. He came to the conclusion that there was some basis for the report that Spain did consider withholding payment on the treaty debt until a settlement was reached on the *Amistad claims*. See Reynolds to James Buchanan, July 8, 1847, MSS., Dept. of State, Dispatches, Spain, XXXV.

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latter's statement, that the president was impressed with the arguments that had been presented and had decided to submit the whole affair to the consideration of Congress.[17] Tyler, however, did something less than that. On February 27, 1843 he submitted to the House of Representatives "sundry" correspondence that had passed on the question since February 1841. In an accompanying message the president called attention to the fact that although, according to the Supreme Court, the case was not one of piracy and thus did not come within the terms of the treaty of 1795, the authority of the *Amistad* had been divested by force, and it was brought into a port of the United States. The salvors, too, were officers and seamen of a public ship. Then he added:

> It is left to Congress to consider, under these circumstances, whether although in strictness salvage may have been lawfully due, it might not yet be wise to make provision to refund it, as a proof of the entire good faith of the Government, and of its disposition to fulfill all its treaty stipulations, to their full extent, under a fair and liberal interpretation.[18]

It should be noted here that when he made up the list of documents which President Tyler submitted to the House on this occasion, in addition to some less important communications Webster failed to include Argaiz's note of June 27, 1842. That minister complained of the omission on the ground that if the question were submitted to Congress that body should have the benefit of all the relevant correspondence. Webster replied that the letter was not considered important to the purpose for which the correspondence was submitted, "as it seems only intended as further argument, on the same question." He assured Argaiz, however, that if it was desired the document would be submitted to the next Congress.[19] This

[17] See Argaiz to Webster, April 9, 1843, MSS., Dept. of State, Notes from the Spanish Legation, XI.

[18] This correspondence with the accompanying letter was printed as 27th Cong., 3d Sess., *House Doc.* 191.

[19] Argaiz to Webster, April 9, 1843, MSS., Dept. of State, Notes from the Spanish Legation, XI; Webster to Argaiz, April 26, 1843, MSS., Dept. of State, Notes to the Spanish Legation, VI.

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promise was fulfilled through the agency of his successor A. P. Upshur on January 24, 1844.[20] Meanwhile the Spanish representative refrained from continuing correspondence on a subject which he believed had been submitted by the executive entirely to the decision of Congress. Indeed the scene did shift to that body for the time being.

On April 10, 1844, C. J. Ingersoll of Pennsylvania, chairman of the Committee on Foreign Affairs, introduced in the House of Representatives a bill providing for an appropriation of $70,000 to satisfy the *Amistad* claims, and submitted for the committee a report in support of the recommendation. The details of this long and elaborate report are not pertinent to this discussion. In substance, it consisted of a complete, if not strictly accurate, history of the *Amistad* case; a denunciation of the interposition of the courts in the affair; a bitter arraignment of the judicial decisions handed down; and, as might have been expected at this time, a defense of the institution of slavery in the United States. The committee took the attitude that since the damage had been done to Spain it was up to Congress, particularly "that grand inquest of the nation, the House of Representatives", to make amends.

> When the Federal courts of justice err [the report concluded] Congress alone can rectify it. It is by act of Congress alone that this debt of national honor to Spain can be paid, as it ought to be, by signal proof to the world that none shall be wronged—not even by judicial authority—without redress, in the United States.[21]

The proposal of the committee met with strong dissent. Opposing Ingersoll's motion to have 10,000 copies of the report printed, J. R. Giddings of Ohio, an ardent opponent of slavery, spoke for an hour against the bill which it supported. Naturally, he took views opposite to those stated in the report; and he expressed the opinion that when captured off the coast of the United States the *Amistad* in reality belonged to the negroes on board. He believed, or affected to believe, that

[20] This dispatch was printed as 28th Cong., 1st Sess., *House Doc.* 83, as has been cited.

[21] 28th Cong., 1st Sess., *House Report* 426.

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the United States should compensate them for this property and the time they were forced to spend in prison.[22] John Quincy Adams prepared and, had it ever been reported from the Committee of the Whole, proposed to deliver a speech against the bill, than which, he said, "a baser and more profligate misappropriation of public money" was never made. While "seven years in a penitentiary cell", he wrote in his Diary, "would be a . . . just retribution" for the report accompanying the bill.[23]

The Spanish minister, now again in the person of A. Calderon de la Barca, was gratified with the Ingersoll report, and the following December once more brought the question of claims to the attention of the secretary of state (then John C. Calhoun) and repeated the process in January 1846 with Calhoun's successor, James Buchanan. The latter, on March 19 following, sent copies of these two letters to Ingersoll with the veiled recommendation that Congress should appropriate the money to pay the claims. Buchanan felt that it "might not be becoming" in him to express an opinion with regard to the validity of the question; but he did say: "So long as it shall remain unsettled, it cannot fail to prove a source of irritation and discord between the two countries, highly prejudicial in many respects, to the interests of the United States". When Buchanan's action was reported in Madrid the Spanish government naturally expected that the settlement of the claims would be effected as a matter of course. For, wrote the secretary of state for Spain, "the executive power not only does not deny it [the justice of the claims], but appears desirous . . . to be furnished with the means of making payment."[24] Congress' only reaction to Buchanan's recommendation at this time, how-

[22] For Giddings' speech, see 28th Cong., 1st Sess., *Congressional Globe*, Appendix, pp. 500-504.

[23] Adams, *Memoirs of John Quincy Adams*, vol. XII, p. 186. Adams' proposed speech and an explanatory letter to his constituents were published in the *National Intelligencer*, April 3, 1845.

[24] Buchanan to C. J. Ingersoll, March 19, 1846, in 29th Cong., 1st Sess., *House Report* 753, p. 1; secretary of state for Spain to Calderon, June 18, 1846, enclosure in Calderon to Buchanan, September 20, 1846, in 31st Cong., 2d Sess., *Sen. Doc.* 29, pp. 7-8.

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ever, was another report, dated June 24, 1846, a duplicate of that of April 10, 1844, from the Committee on Foreign Affairs of the House of Representatives.[25] The next step was taken by the upper body of the legislature.

Late in the following session of Congress the Senate added to the House civil and diplomatic bill an amendment proposing an appropriation of $50,000 to be paid to Spain for distribution among the *Amistad* claimants.[26] Then the Department of State, for its own part, unreservedly admitted the justice of the claims. Advocating an approval of the Senate amendment in a letter to the chairman of the House Ways and Means Committee, Buchanan said, in part: "I have given the question a thorough and deliberate consideration, and cannot avoid the conclusion that the claim is well founded under the 8th, 9th, and 10th articles of our treaty with Spain of the 20th October, 1795." He then sent a copy of this letter to Calderon with the assurance that this acknowledgment of the justice of the claims had met with the approval of President Polk.[27]

The House of Representatives, however, proved adamant. Adams led the opposition. Pale, trembling, and with a weak voice, as described by listeners, it was on this occasion that he delivered his only regular speech of the session. Adams asserted that there was no basis whatever for the indemnity claims; that their payment would be a perfect "robbery of the people of the United States." Withal, if the decision of the Supreme Court were to be discarded, it was a matter for Congress to decide, and not the secretary of state. On March 2, 1847 the House in a vote that showed distinct aspects of sectionalism on the slavery question, defeated the Senate amendment by the count of yeas 40, nays 113.[28]

Up until this time, as has been noted, the negotiations on the *Amistad* question had been conducted exclusively in Wash-

[25] 29th Cong., 1st Sess., *House Report* 753. The report proper covers pp. 4-17.

[26] 29th Cong., 2d Sess., *Cong. Globe*, February 25, 1847, p. 506. This amendment was accepted without a count of votes.

[27] March 19, 1847, in 31st Cong., 2d Sess., *Sen. Doc.* 29, pp. 10-11.

[28] 29th Cong., 2d Sess., *Cong. Globe*, Appendix, pp. 437-438; *ibid.*, House of Rep. *Journal*, March 2, 1847, pp. 483-484.

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ington. Following this failure of Congress to vote the appropriation recommended by the executive, however, the Spanish government registered an official complaint at the American legation in Madrid. This carried with it the intimation that if the claimants, contrary to the wishes of the ministry, should succeed in bringing the question before the Cortes the government might not be able to resist demands to suspend the payments on the treaty debt of 1834 until the United States had paid the *Amistad* awards. In the temporary absence of the minister T. C. Reynolds, secretary of the legation, somewhat indiscreetly offered a lengthy reply. He set forth an argument against the validity of the claims and the obligation of the United States to pay the awards that would have done credit to Adams or Webster. Recommendations that they be paid, he maintained, had been made in the nature of a concession. Failing to do so, the United States would occupy the position, he said, of "declining to do a gratuitous favor, not . . . refusing to liquidate a debt". Yet he attempted at some length to explain away the failure of the House of Representatives to vote the appropriation, mentioning the pressure of business near the end of a session, the connection of this question with the slavery issue in the United States, overconfidence on the part of friends of the measure, etc. Besides, he stated, this action was not final; the president undoubtedly would press the matter again, at which time the necessary funds would likely be secured.

Reynolds sent copies of the note he had received and his reply to Buchanan. The secretary of state was displeased at this turn of affairs; he had preferred, he said, to handle the matter, chiefly in conversation, with the Spanish minister in Washington. Yet since it had been broached in Madrid he instructed the American minister there to tell the Spanish minister of foreign affairs that the United States would brook no interruption in the payments due from the treaty of 1834, but that all proper means would be used to obtain the *Amistad* appropriation from Congress.[29]

[29] Reynolds to Buchanan, July 8, 1847, MSS., Dept. of State, Dispatches, Spain, XXXV; Buchanan to R. M. Saunders, September 29, 1847, MSS., Dept. of State, Instructions, Spain, XIV.

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President Polk made such a recommendation in his next annual message. Entertaining the conviction that the claims were just, he said: Good "policy, no less than a faithful compliance with our treaty-obligations" requires that the small sum demanded should be paid.[30] This produced in the House of Representatives nothing more than another bitter attack by Giddings on the policy suggested. The following August, however, by the non-sectional vote of yeas 24, nays 21, the Senate once more amended the civil and diplomatic bill by proposing an appropriation of $50,000 to pay the *Amistad* claims. Yet in the closing days of another session this amendment, like the similar one in the preceding Congress, was defeated in the lower body.[31] Inasmuch as the president and the Senate, "the two powers, to which the direction of diplomatic relations is confided", had admitted the justice of the claims, Spain professed to see no reason why the House of Representatives should refuse the money.[32] Thenceforward, however, its attitude remained the same; in fact, such a proposal was not considered seriously again in the lower branch of Congress.

Thwarted as it was, the Polk administration made no further active attempts to secure the desired appropriation. Nor did the succeeding one. Continued demands on the part of the Spanish government, however, caused President Fillmore to make the question the subject of a special message on January 17, 1853, when he submitted copies of this correspondence to Congress and urged in a non-committal manner that some final action be taken. In his first annual message Franklin Pierce definitely recommitted the executive to the policy of acknowledging the equity and justice of the claims, but he made no further reference to the subject. Throughout his administration, however, President Buchanan was tireless in

[30] *A Compilation of the Messages and Papers of the Presidents*, ed. by J. D. Richardson (10 vols., Washington, 1896-1899), vol. IV, p. 551. Obvious references as this will be omitted hereafter.

[31] 30th Cong., 1st Sess., *Cong. Globe*, January 4, 1848, pp. 101-102, August 9, 1848, p. 1055; *ibid.*, Senate *Journal*, August 3, 1848, p. 529.

[32] Calderon to Buchanan, August 22, 1848, in 31st Cong., 2d Sess., *Sen. Doc.* 29, pp. 13-14.

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urging Congress to vote the appropriation he had so earnestly advocated as secretary of state.

During this fourteen-year period numerous attempts were made in the Senate to settle the controversy in Spain's favor. On February 19, 1851 Senator J. M. Mason, for the Committee on Foreign Relations, introduced a bill proposing that the sum of $50,000 be appropriated in satisfaction of the *Amistad* claims, which was accompanied by the usual report. In giving a complete history of the affair to that date the committee argued at some length that according to the treaty of 1795 the United States was obligated to comply with the Spanish demands at the time of the detention of the vessel. The main point made, however, was the assertion that the judiciary was not the proper agency to determine finally the obligations of the United States under the treaty. In such instances, it said, nations look only to the contracting power. In this connection the report continued:

> And it is no answer to Spain, neither can the government exonerate itself toward her. . . . by saying that the judiciary . . . assumed jurisdiction of the subject, and thus withdrew it from the control of the government which made the treaty, and which became responsible for its observance. . . . It is no answer to Spain, to say that this subject has been determined by the judiciary . . . adversely to this claim of Spain; and it becomes necessary in consequence, for the executive and legislative departments of the government, in replying to the demands of Spain, to construe the treaty originally, and to decide the obligations that may arise under it.[33]

The bill was passed to a second reading, but the Senate took no further action upon it. In March 1852, and again in February 1858, identical bills accompanied by duplicate reports from the Committee on Foreign Relations were likewise blocked. On the last-mentioned date, however, the committee was divided in opinion. Senators Solomon Foot and William H. Seward submitted a minority report which presented, in general, the same views heretofore noted in the speeches and correspondence of those opposed to making payment of the

[33] 31st Cong., 2d Sess., *Sen. Report* 301.

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claims. These were not supported, the two senators said, by the facts nor the law. The United States, the minority report continued, "are in no manner compromised or obliged to satisfy [these claims] by the executive recommendations, made in the face of an adjudication of our highest court, and without any new facts on which to base them." [34]

Mason made two more unsuccessful attempts to have the Senate consider his bill. Yet these resulted in little more than statements from the opponents of the measure that it was "entirely unfounded"; and that it was an "utter rascality", with an absence of "any merit or of any honor of any kind or description." [35]

Meanwhile other claims had arisen between the two governments; and the negotiations on the "Cuban claims" had reached a critical stage. These had grown out of events which, as their name implies, occurred in Cuba. On October 8, 1844, following a hurricane in the island, the provincial authorities had issued, subject to the approval of the home government, a decree permitting for a period of six months the importation of certain foodstuffs and building materials into Cuba free of duty. Numerous American merchants and some in other countries immediately took advantage of the opportunity thus afforded. Having failed to receive the sanction of the Spanish government, however, the ordinance was suddenly annulled on February 20, 1845. This naturally resulted in unexpected losses upon many shipments that were on the high seas at the time. Nearly one hundred American individuals and firms were affected, while the damages as eventually determined amounted to $128,635.54.[36]

[34] The report of March 1852 is 32d Cong., 1st Sess., *Sen.* Report 158; while both the majority and minority reports of February 1858 are printed as 35th Cong., 1st Sess., *Sen. Report* 36.

[35] 35th Cong., 2d Sess., Senate *Journal*, December 6, 1858, p. 7; *ibid.*, *Cong. Globe*, February 9, 1859, pp. 904-905.

[36] See Treaty with Spain, March 5, 1860, MSS., Dept. of State; Buchanan to Irving, May 9, 1845, MSS., Dept. of State, Instructions, Spain, IV; A. C. Dodge to Lewis Cass, October 20, 1858, MSS., Dept. of State, Dispatches, Spain, XLI. A complete list of the claimants is given in 35th Cong., 2d Sess., *Sen. Doc.* 18, pp. 26-28.

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Acting upon instructions from the Department of State, Irving in Madrid soon made reclamation to the effect that the government of Spain should indemnify these losses. The matter was not pressed insistently at the time; but a few years later Spain agreed to make the payments as soon as the amounts in question could be determined.[37] Then it was that the United States made earnest but futile efforts to bring about a final settlement. It is not the object of this discussion, however, to consider in any detail the negotiations with respect to the "Cuban claims" except as they were connected with those which Spain was then urging the United States to settle.

That the one was pitted against the other was clearly shown as early as August 1857 in a "warm, excited, and unpleasant" interview between A. C. Dodge, the American minister to Spain, and the Marquis of Pidal, Spanish minister for foreign affairs. Dodge complained at the delay incident to the settlement of the "Cuban claims". The reply was that the length of time which had elapsed since Spain promised to examine and consider them was as nothing compared to that which had elapsed since the solemn pledge of the "Government of the United States" to indemnify the claimants in the *Amistad* case. In reporting this interview Dodge said:

> I trust for the honor of the United States, that Congress will, at its approaching session, appropriate the necessary funds to liquidate the 'Amistad case'. Few, at home, can imagine the mortification which my predecessor and myself have been made to suffer from the manner in which this case is forever thrown in our teeth when we are pressing just and long-delayed claims upon the Spanish Government.[38]

President Buchanan briefly explained this situation in his first annual message when he insisted that Congress vote the money in settlement of the *Amistad* case. As was expected,

[37] Irving to Alexander Mon, August 8, 1845, enclosure in Irving to Buchanan, August 23, 1845, MSS., Dept. of State, Dispatches, Spain, XXXIV; Calderon to Pierre Soule, June 1, 1854, enclosure in Soule to W. L. Marcy, June 10, 1854, *ibid.*, XXXIX.

[38] Dodge to Cass, August 15, 1857, MSS., Dept. of State, Dispatches, Spain, XL.

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the failure of Congress to do so continued to hamper the negotiations pertaining to the "Cuban" and other claims held by the United States against Spain. In the following August the American minister again wrote from Madrid:

> Vain though it be, & is, I cannot refrain from the expression of regret that Congress did not appropriate the funds so urgently asked by the executive to pay the Amistad claim. . . . Could that honorable body realize, as I have so often done, the deep injury resulting to us from the non payment of this unquestionably just claim I am sure it would not continue to overlook or disregard the forcible & truthful recommendation made by Mr. Buchanan . . . in favor of its liquidation.

Two months later Dodge was forced to report that although the total of the "Cuban claims" had been determined at $128,635.54, Spain had agreed to pay but one-third of that amount, and that without interest. The offer was accompanied, moreover, by a declaration that the proffered indemnification was not founded on reason or justice, but was being made as a special favor.[39]

Regardless of the inability to redeem its acknowledgments to Spain in the *Amistad* affair, the executive continued to exert every effort to secure full payment of the "Cuban claims". During a conference between Saturnino Calderon Collantes, the Spanish secretary of state, and W. P. Preston, Dodge's successor in Madrid, held in November 1859, Spain yielded to the extent of promising to pay the principal *in toto*, but still withheld an offer of the interest. At the same time the two men agreed tentatively upon the terms of a convention to create a commission for the purpose of settling all outstanding private claims between the two governments. Preston was authorized to conclude such a convention, and to accept the offer made on the "Cuban claims".[40] That, however, was withdrawn in part. In December Buchanan issued another in his series of

[39] Dodge to Cass, August 25, October 20, 1858, MSS., Dispatches, Spain, XLI.

[40] W. P. Preston to Cass, November 27, 1859, MSS., Dept. of State, Dispatches, Spain, XLII; Cass to Preston, December 24, 1859, January 18, 1860, MSS., Dept. of State, Instructions, Spain, XV.

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executive recognitions of the *Amistad* claims, and urged Congress to take a similar stand. His message was given full publicity in the Spanish press. Before final arrangements had been made to liquidate the "Cuban claims" Collantes told Preston the force of public opinion in Spain was such that he could not make this payment without holding in reserve a sufficient amount to satisfy the demands resulting from the capture of the *Amistad*. The American minister naturally refused this proposal. Generally sympathetic with the Spanish point of view, however, and realizing that without some concession in that respect no adjustment could be made for the claims held against Spain, he suggested the compromise which was incorporated in the convention signed on March 5, 1860.[41] This is explained in the following brief analysis of that convention.

Spain agreed to assume responsibility of settling for the entire sum of $128,635.54 in satisfaction of the "Cuban claims". Only $100,000, however, would be paid immediately. The remainder was to be withheld pending the action taken by the United States with reference to the *Amistad* claims. They, together with all other claims which had arisen between the two governments since 1834, were to be submitted to a Board of Commissioners for examination and final decision. The personnel of this board, according to the treaty, was to consist of three members selected in the following manner: Each government agreed to appoint one. These two were to name the third, providing they could reach an agreement. If not, they would each nominate an individual; and from these two the third member would be chosen by lot in presence of the original commissioners.

This board, it was provided, should make its decisions on all claims that were submitted to it within nine months after it had been organized. The first meeting of the board was to take place in Washington; but it was to be permitted to adjourn later to New York or Havana, as was deemed expedient to conduct its business. Each nation agreed to furnish all

[41] Preston to Cass, March 6, June 28, 1860, MSS., Dept. of State, Dispatches, Spain, XLII.

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documents and evidence in its possession, which the board might consider necessary to render the awards. The vote of two of the three members, it was agreed, should be sufficient to determine the decision on any one claim. The decisions were to be in writing; and from them no appeals were allowed.

Finally, the following arrangement was made with reference to the balance of $28,635.54 which Spain was to retain from the total due to the United States on account of the "Cuban claims":

> If the award of the Board of Commissioners should be adverse to the "Amistad" claimants or, if the . . . United States, complying with it, should pay the sum that may . . . become due in virtue thereof; then the Government of Her Catholic Majesty, binds itself to pay the said residue . . . to the United States . . . but if the decision should be favorable to the "Amistad" claimants, and the American Government should refuse to fulfill the said award, or neglect its fulfillment for one year . . . then, Spain shall pay to the "Amistad" claimants, the sum retained; and, if the said sum retained, shall be more than sufficient to satisfy the award, then the Government of Her Catholic Majesty shall pay to the United States, the excess for distribution among the . . . Cuban claimants; but, if on the contrary, the sum reclaimed shall be insufficient, the Government of the United States binds itself to pay to the Government of Her Catholic Majesty, the difference, for the use of the "Amistad" claimants.[42]

This treaty met with the approval of President Buchanan, who on May 3, 1860 submitted it to the Senate to secure the constitutional advice and consent of that body to its ratification. Thus it was left for the Senate to determine whether the United States would agree, not to recognize these claims, be it understood, but merely to submit them to a fair and impartial arbitration. The answer was in the negative. On June 27 the treaty was rejected by the close vote of yeas 26, nays 17. This action was immediately reconsidered, but the count on the second vote of advice and consent to ratification was almost identical with the first. The defeat of the treaty

[42] Treaty with Spain, March 5, 1860, MSS., Dept. of State.

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was almost purely a political party measure. Twenty-four Democrats, one Republican, and one southern Whig voted for it; while twelve Republicans, one Democrat, two northern Whigs, and two Free Soilers were in the opposition.[43] Accordingly, it is evident that the anti-slavery faction was responsible for the failure of this, the last serious effort to adjust the claims which had been pending for almost two decades.

The attempt is made in this discussion to point out the inconsistencies of policy, largely the result of the slavery controversy in the United States, between and (excepting the judicial) within the three branches of the government in dealing with the diplomatic problem arising with Spain as a result of the capture and detention of the schooner *Amistad* in 1839. As has been noted, the more numerous reversals of policy, and because of its position with regard to the control of foreign relations the more significant, occurred in connection with the executive branch. In the latter part of the period that has been covered, however, though in opposition to the will of the judiciary and the lower house of the legislature, and, for the most part, that of the Senate, it had maintained consistently for the greater part of four administrations the policy of complying with the Spanish demands. There remains, in conclusion, only to show how this position was reversed again by the one which came in with the outbreak of the Civil War.

Needless to state, the rejection of the treaty of March 5, 1860 was a source of regret, if not of surprise, to President Buchanan and the Spanish government. It effectively blocked for the time being all attempts on the part of the United States to secure the payment of the Cuban indemnities and to arrange for a general settlement of claims between the two govern-

[43] *Journal of the Executive Proceedings of the Senate of the United States of America, 1789-1901* (32 vols. in 34, Washington, 1828-1911), vol. XI, pp. 183, 227. The information with regard to the party affiliation of the senators who participated in these votes was gained largely from the biographical sketches in *The Biographical Directory of the American Congress, 1774-1927* (Washington, 1927). For a more complete statement regarding the Senate's action upon the treaty, see R. Earl McClendon, "The Two-Thirds Rule in Senate Action upon Treaties, 1789-1901", *American Journal of International Law*, vol. 26, pp. 37-56 (January 1932).

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ments.[44] These were problems, however, which despite the disturbed state of the Union were taken up again soon after the Lincoln administration came into power. In July 1861 H. J. Perry, minister *ad interim* at Madrid, wrote Secretary Seward that he believed he could draw up a convention for the settlement of claims that would meet with the approval of the Senate. It would have to be free, he said, from special clauses referring to particular claims, but embrace all "without designation or exception of any." This brought from the secretary of state a significant reply which must be noted in some detail.

Seward stated that the United States would be willing to enter into a convention providing for the settlement of pending claims; in fact, it was deemed especially desirable that such should be done. Yet he added:

> But this Government does not regard the so-called Amistad claim as having any valid obligation in law or conscience and can in no case consent to negotiate upon it. While, therefore, we shall not be critical as to the form of words to be used in describing the claims to be submitted to the proper joint commission, frankness requires that the exception of that supposed claim shall be expressed or at least distinctly understood.
>
> I am well aware that this instruction differs radically from admissions and acknowledgments made by several of the predecessors of the President. Each of them has considered the subject for himself, and pronounced upon it according to his own convictions. The new President, under the same obligation, instructs me to make known to you his disallowance of the claim in question. It were indeed desired that there should be

[44] On October 25, 1860 Preston wrote Secretary Cass: "I feel, at present, that no steps can be taken to press the claims of our citizens further upon the government with success. We cannot demand a settlement of our claims, and their prompt payment, while we refuse to let theirs even be heard by arbiters. We cannot enforce the settlement of doubtful demands, by our people against Spain, and refuse to pay those which our previous Presidents have repeatedly admitted as just. The reclamations for the slaves of the Creole were included under the Convention with England, and were finally allowed and paid, and it is difficult to maintain that the Amistad claimants should not even have their demands heard." MSS., Dept. of State, Dispatches, Spain, XLII. See also Carl Schurz to W. H. Seward, September 5, 1860[1], *ibid.*; James Buchanan, *Mr. Buchanan's Administration* (New York, 1866), pp. 258-260.

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> consistency in the action of the Government throughout successive administrations, especially when foreign nations are concerned, but justice and reason cannot be safely compromised by any Government, even for the sake of preserving perfect consistency with itself through a series of years and in intercourse with foreign states.[45]

Upon receipt of these instructions Carl Schurz, who had succeeded Perry at the American legation in Spain, told Collantes in conversation that for reasons connected with "its own internal politics" the United States would not consent to include the *Amistad* case in a general settlement of claims, because of its "bearing upon the slavery question now of such paramount interest in the U. S." Collantes replied that under such circumstances Spain would be willing to consider any proposition the United States might wish to offer in order to obviate this difficulty. Schurz concluded that it would be necessary for his government to make a liberal allowance on some other claim, making it possible for Spain to "satisfy in a private way" the *Amistad* claimants. So he informed Seward when reporting the interview. The idea was not acceptable to the secretary of state, who wrote Schurz as follows:

> We should be glad to effect a measure for the adjustment of mutual commercial claims, but we cannot admit that the Amistad claim has any foundation in justice or moral right. It is for Spain to refuse to treat with us upon this ground, if she thinks it sufficient. We can only regret it, and wait for her to reconsider the subject.[46]

In such a manner, as it proved, Seward put an end to the negotiations on the question.

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[45] H. J. Perry to Seward, July 12, 1861, MSS., Dept. of State, Dispatches, Spain, XLIII; Seward to Schurz, August 15, 1861, *ibid.*, Instructions, Spain, XV.

[46] Schurz to Seward, September 5, 1860[1], MSS., Dept. of State, Dispatches, Spain, XLIII; Seward to Schurz, November 5, 1861, *ibid.*, Instructions, Spain, XV.

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"THE LABOR INJUNCTION"

THREE years ago Frankfurter and Greene published their work on the use of the writ of injunction in labor controversies.[1] To the present writer the book was exciting to a degree. Much more importantly, in retrospect it appears to have had not only scientific interest but significant practical effects. Directly or indirectly, it has been stimulating to a great many legislators here and there. Since its publication much water has gone over the dam. But the speed and course of the legislative current in the stream of events—in so far at least as labor-dispute legislation is concerned—has been so obviously affected by Frankfurter and Greene, through the book itself and through their active enterprise[2] (both before and after the book's appearance) as expert advisers of, and bill-drafters for, Federal and state legislative committees, that it seems not inappropriate to attempt a retrospective evaluation of the book in the light of the legislative and economic developments that have followed its publication.

There is assumed no such causal relationship between the work of these two men and the flow of *economic* events as has been implied respecting those which are purely legislative. The former, of course, have a bearing upon the *theme* of their book which is more fundamental than is the case with legislation. As will be noted more fully below, the onset of the great depression, by making the formerly somewhat rare use of the injunction *by unions against employers* seem prospectively more profitable than the calling of strikes against them, tended to drive organized labor to reëxamine and reformulate its position and its working strategy respecting the labor-dispute injunction. From the economic point of view, therefore, the following discussion might more accurately be described as an appraisal of the economic problem of the labor injunction, utilizing the work of Frankfurter and Greene as a point of reference and departure and as a source of illustrative material.

[1] *The Labor Injunction*, by Felix Frankfurter and Nathan Greene. New York, The Macmillan Company, 1930. 343 pp. $5.00.

[2] In coöperation with a number of others. *Cf. infra*, p. 420.

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I

It would be an exaggeration to say that the quest of an injunction is the usual procedure of employers in time of labor trouble; but among the several conventional procedures[1] it is, except for trial by (strike) battle, perhaps the most firmly rooted. Moreover, the frequency of application, in behalf either of employers or employees, for injunctive relief in labor-dispute cases is now definitely on the increase. Curiously enough the use of the injunction by the parties to labor controversies, who began experimenting with it about fifty years ago,[2] seems to be habitual only in the United States. Before the turn of the century the experimentation had spread widely through the country and by 1920 or earlier it had become settled American practice, involving hundreds of applicants annually.

The results of the practice were such as to arouse, long before it had become widespread, the most bitter criticism from organized workers and from their leaders. This hostility continues, apparently unabated, despite the fact, already mentioned, that some unions are now repeatedly resorting to the courts for injunctive relief against employers. The sustained resentment which the use of the injunction in labor controversies has kindled and kept alive in the ranks of organized labor, is not the result only of the fact that the injunction often seriously interferes with labor activities; it flows as well from the fact that this "equitable remedy" often operates inequitably to the damage of the union and its membership. There can be no question that from the standpoint of the public interest the machinery of equitable relief by injunction has worked badly in the field of industrial disputes. Sometimes it has worked badly because it has wrongly interfered with the legitimate activities of organized labor and with the rights of workpeople. Sometimes it has worked badly

[1] Others being (1) the unrelieved strategy of lockout or wearing down of strike, with private detectives and deputy sheriffs on occasion; (2) conference, "talking it over with the other fellow", conciliation, in the unofficial sense of the word; (3) mediation; and (4) arbitration, these last two in many forms.

[2] So far as the writer knows the first injunction ever applied for in a labor controversy, was in the case of *Müller v. Grantz* (unreported), New York City, 1875. (11 *Albany Law Journal* 278). The injunction was granted *ex parte*, and continued in a somewhat relaxed form after hearing. The well-known English case, *Springhead Spinning Co. v. Riley* (L. R. 6 Eq. 551), had come only seven years earlier. The *Müller* case seems to have been the first of thousands of American descendants of the *Springhead* doctrine which in England scarcely outlived the first instance of its application.

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because it has been quite ineffective—a pointless, useless, expensive ritual.

After the pioneer Müller case[1] it was nearly twenty years before the use of the injunction in labor controversies took on the proportions of a serious economic problem. In May 1894 the employees of the Pullman Company struck in a protest against wage-cuts. In June a sympathetic strike of employees of two of the railroads entering Chicago was called. On July 2 an injunction issued from a Federal court[2] enjoining the principal officers of the American Railway Union, including one Eugene V. Debs, among other things, "from compelling, or inducing by threats, intimidation, persuasion, force or violence, railroad employees to refuse to perform their duties."[3]

II

Since the Debs case the writs have issued out of Federal and state courts with increasing frequency and their accumulated number now runs into the thousands, while hundreds are added yearly. More than 300 Federal injunctions are reported to have been issued in the strike of the railroad shopmen in 1922.[4] Over 800 have been issued by the state courts of New York State since 1914. As a result this relatively new use of an ancient instrument has become the subject

[1] *Cf. supra*, p. 414, note 2. In the following pages all cases cited are, unless otherwise noted, labor injunction cases, i. e., suits for injunction precipitated by disputes between an employer or group of employers on one side and on the other a group of employees, usually organized employees. The phrase "labor injunction" seems generally to be used in practice to designate those injunction orders or actions arising out of controversies between employers and organized groups of employees. It means collective-labor-dispute injunctions and therefore excludes consideration of the numerous injunction cases arising between (1) employers and individual employees, (2) members and officers of unions, (3) local unions and parent internationals, and, with a few exceptions, (4) rival independent unions.

[2] *United States v. Debs*, 64 Fed. 724 (N. D. Ill. 1894), 5 Inters. Com. Rep. 163; Contempt decree aff'd, *In re Debs* (1895), 158 U. S. 564.

[3] U. S. Strike Commission: *Report on the Chicago Strike* (Washington Govt. Ptg. Office, 1895), p. xl. The language quoted is the Strike Commission's paraphrase of parts of the injunction order, which may be found in full in *Record on Appeal* of 158 U. S. 564. The text of the order is reprinted in E. S. Oakes, *The Law of Organized Labor and Industrial Conflicts*, at 1124, and in Frankfurter and Greene, *op. cit.*, at 253.

[4] *Limiting Scope of Injunctions in Labor Disputes. Hearings before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 70th Cong. 1st Sess. on S. 1482* (Washington, 1928), at 39.

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of violent controversy between employers and trade unionists and in the state and national legislative chambers to which the interested parties have brought their proposals for the restriction or even the outright abolition of such use. The clash of interest on strike-front and picket-line, shifted into court-room and legislature, has precipitated a considerable amount of literature in addition to the flood of typed or printed documents poured out in the course of litigation, complaint bills, briefs, orders, occasional transcripts of testimony and —most voluminous of all—the ubiquitous affidavits, often dozens, not infrequently hundreds, of them smothering a single case. Numerous legislative hearings and debates, both Federal and state, and a few statutes have contributed to the printed matter—if not to the literature.

Supplementing the official record, there have followed scores of thoughtful law-journal articles, most of them weighed down by footnotes; hundreds of passionate diatribes in trade-union organs, in the newspapers and a few in the trade journals; a handful of competent discussions in the economic journals—and three or four books.[1]

Until 1930 the only book dealing with this aspect of the labor problem was a little volume entitled *The Labor Injunction*, by John P. Frey,[2] editor of the *International Molders' Journal* and a leading trade-union official. This pioneer book served a useful purpose in making the defects and abuses of strike injunctions more widely known, especially among trade unionists, but its effectiveness was seriously limited by its bias and misplacement of emphasis. Moreover, since its publication a decade of development has taken place. During this time the nature and effect of the Clayton Act became more clearly understood and an important change took place in the policy followed by some unions in regard to use of the injunction by trade unions against employers. By 1929 it had become quite

[1] There are, of course, the books that are not books—the records on appeal, which usually, as in New York State, must be printed. The typical appeal record is a sizeable book, containing the pleadings, affidavits, orders and opinions below, and where cases already have been tried on the merits, the transcript of testimony. Briefs are not included. In New York City in labor injunction cases arising between 1918 and 1932 in the State courts alone, no less than 100 of these appeal volumes have been printed, including eleven books resulting from appeals to the Court of Appeals.

[2] *The Labor Injunction, an Exposition of Government by Judicial Conscience and Its Menace.* The book bears no date, name of publisher, or place of publication. It was probably published about 1922, and by the Equity Publishing Company, Cincinnati.

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certain that, as had been strongly suspected since the Duplex and Tri-City cases, the Clayton Act of 1914, as the courts were interpreting it, was more of an acceleration of, than a brake upon, strike injunction issuance [1] and that, in the Federal courts at least, more effective legislation was needed. Furthermore, by 1930 the invocation of the injunction by trade unions against employers appeared to be well on the way toward becoming a regular, established phase of trade-union policy and practice, at least among certain internationals, whereas in 1921, when Schlesinger's union enjoined Quinto's employers' association,[2] such action had been regarded, in certain sections of the labor movement, as unusual, inappropriate and unlikely to be effective.

The publication in 1930 of *The Labor Injunction* [3] by Frankfurter and Greene was, therefore, an important event. In the production

[1] Scrutiny of all of the reported Federal labor cases has led Professor Christ to this conclusion about the effect of the Clayton Act upon the issuance of injunctions by the Federal courts: " . . . (a) that 10 injunctions were issued, that could not have been issued without the statute; (b) that 35 other injunctions were issued in spite of the statute, and (c) that in not a single one of the remaining 26 reported cases was an injunction denied on account of the statute". "The Federal Courts and Organized Labor" (1932), 5 *Journal of Business:* at 104.

[2] *Schlesinger v. Quinto*, 201 App. Div. 487.

[3] *Supra*, p. 413, n. 1. Most of the text had appeared earlier in the form of law journal articles: the first three chapters appeared in the London *Law Quarterly Review*, (vol. 44, pp. 164-197 and 353-380, April and July, 1928; vol. 45, pp. 19-59, Jan. 1929). Other parts of the book appeared in 38 *Yale Law J.* 879-935 (May 1929), "Legislation Affecting Labor Injunctions", and in 42 *Harvard Law Rev.* 766 (April 1929), "Labor Injunctions and Federal Legislation".

In the three years that have passed since Frankfurter and Greene published their book, two other important works on the injunction have appeared: *The Strike Injunction in the New South* by Duane McCracken (Chapel Hill, N. C., Univ. of No. Carolina Press, 1931), and *The Government in Labor Disputes*, by E. E. Witte (New York, McGraw-Hill, 1932).

Among the articles on the subject which have appeared recently in periodicals are: "Injunctions in Labor Disputes in the U. S." by E. E. Witte, 21 *Int'l Labour Rev.* 315-347 (March 1930); "The Use of Injunctions in Labor Disputes" in *Information Service* (published by the Federal Council of Churches, New York), March 8, 1930; "The Use of the Labor Injunction in the New York Needle Trades" by P. F. Brissenden and C. O. Swayzee, 44 POL. SCI. QUAR. 548-568 (Dec. 1929) and 45 POL. SCI. QUAR. 87-111 (March 1930); "Labor Injunctions in Illinois" by Robert Kingsley, 23 *Ill. Law Rev.* 529-555 (February 1929); "Labor's Resort to Injunctions" by E. E. Witte, 39 *Yale Law J.* 374-387 (Jan. 1930); "Organized Labor as Party Plaintiff in Injunction Cases" by A. T. Mason, 30 *Col. Law Rev.* 466-487 (April 1930).

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of this book the authors rendered a signal service to laymen no less than to lawyers, to legislators and judges no less than to students and teachers of labor problems and of law. Scholars had for the first time between a single pair of covers a penetrating and completely documented analysis of the problem, and a lucid description and portrayal of papers and procedure. Lawyers found here not only informed comment on all of the important cases; they found also suggestive criticism and appraisal of the judicial results of the litigation of the cases and acute commentary regarding the social consequences of the conclusions crystalized in the decisions. For similar reasons the book should be good for judges even if all that they do in labor cases is to apply the law to the facts. If what they do in these cases is to apply to the facts their own ideas as to what is desirable public policy, this book should *a fortiori* have a beneficent effect upon the judicial mind and so upon the tenor of judicial opinion.[1]

The recent enactment by the Congress of legislation[2] designed

[1] The present writer already has seen several opinions emanating from judges of the state courts of New York State, in which Frankfurter and Greene are cited, the most recent one noted being *J. H. & S. Theatres, Inc. v. Fay*, 2d action (1932) 260 N. Y. 315, at 321; (1933) 89 *N. Y. L. J.* 29.

[2] The Norris-LaGuardia Act, 47 U. S. Stat. L. 70 (Public No. 65. 72nd Congress. Approved March 23, 1932). In addition to the discussion of this statute in the Frankfurter-Greene volume the following articles dealing with it may be noted: "The Federal Anti-Injunction Bill" by J. F. Christ, 26 *Ill. Law Rev.* 516-539 (January 1932); "Is the Norris Act Constitutional" by J. F. Christ, 19 *Va. Law R.* 51 (1932); "The Federal Anti-Injunction Act" by E. E. Witte, 16 *Minn. Law Rev.* 638-658 (May 1932); "Congressional Power over the Labor Injunction" by Frankfurter and Greene, *infra*, p. 421, n. 1; "The Shipstead Substitute Anti-Injunction Bill" by Murray T. Quigg, 32 *Annalist* 973 (Dec. 21, 1928), reprinted in 11 *Law and Labor* 3 (Jan. 1929). So far as the present writer is aware the Norris Act has not yet been construed by any court. It will almost certainly have to meet the test of constitutionality. Possibly the first case to come up under the new law is: *Capitol Fur Shop v. Fur Workers Union* (Equity No. 54677, Sup. Ct. Dist. of Col. 1932). Defendant union alleged in its answer that the case was subject to the provisions of the Norris Act and Judge O'Donohue dismissed the bill without opinion.

Ancillary to a Federal receivership proceeding a motion at once to punish for contempt and to enjoin strike pickets was made in New York City in February 1933. The action was brought as a result of efforts by the Food Workers' Industrial Union to pull strikes in certain cafeterias in the Foltis-Fischer chain. On February 25 Judge Bondy signed an order to show cause, without a stay, returnable March 1, 1933, from which date argument was postponed first to March 8 then to March 15, 1933. After argument but before

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to limit the jurisdiction of the (Federal) courts in respect to the issuance of injunctions in labor-dispute cases makes it unlikely that congressmen will again, in the near future, be obliged to consider what positions they should take regarding such legislation. But members of several—perhaps most—of our state legislatures, are likely soon to have to face these issues and to them the Frankfurter-Greene volume should be a boon. Especially useful to them should be the critical review, in chapter iv, of legislation affecting labor injunctions and the clause-by-clause analysis, in the final chapter, of the Federal bill, which now is law.

In a significant sense the work of Frankfurter and Greene is a vitalizing footnote to the Norris-LaGuardia Act, the sort of footnote that lights up and even helps to form the text. The text of the substitute Shipstead bill (very nearly the same document in form and content as the bill which later became the Norris-LaGuardia Act),

decision the receiver withdrew the motion. (*Model Dairy Co. v. Foltis-Fischer, Inc.*, in the matter of the application of the Irving Trust Co., as receivers to punish Sam Kramberg [and 12 others] for civil and criminal contempt of court. U. S. D. C., S. D. of N. Y. Case No. E 69-44, 1933). A few days after the withdrawal of the motion in the Federal court to punish and restrain, the receiver brought suit for injunction against the union in the New York Supreme Court. After argument there on March 27, Mr. Justice McCook on April 7 signed an order enjoining violent acts (*Irving Trust Co. v. Rubin*, Spl. Term, Pt. 1, N. Y. Co., *N. Y. L. J.*, April 6, 1933). Application for more drastic restraint, based on allegation of continued disorder, brought further argument on May 1, after which Mr. Justice Valente on May 18 enjoined the defendant union "from interfering in any manner" with the business of the twenty-one cafeterias controlled by the plaintiff. He directed "an immediate trial of the issues" (*N. Y. L. J.*, May 16, mem.). On May 17, the day before the second injunctive order was signed, the defendant union in the state-court suit intervened in the Federal receivership case with a motion to restrain the plaintiff receiver from further prosecution of the litigation in the state court. The show-cause order signed upon submission of this application itself contained a preliminary restraining order enjoining the receiver from further proceedings. The next day, despite the Federal stay, the Valente injunction order was signed and served upon the pickets. On May 19 the union's motion came on to be heard in the Federal court. Judge Bondy, apparently, reserved decision and, as this account goes to the printer, the matter still remains undecided. The temporary injunction in the state court continues in effect. The pickets are taken off. The trial in the state court awaits the pleasure of the Federal court. (See *Bulletin of the International Juridical Ass'n*, March and June, 1933).

For a summary of state and Federal anti-injunction legislation, see "Anti-Injunction Laws in Labor Disputes" 35 *Mo. Lab. Rev.* 66-68 (July 1932) with reprint of text of Norris-LaGuardia Act, at 70.

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appears as an appendix to the Frankfurter-Greene volume and the final chapter of that volume, as already stated, consists chiefly of a running analysis of the bill. And more, the book as a whole may be said to crystalize no small part of the expert counsel of which the legislators in charge of the bill were wise enough to avail themselves. Professor Frankfurter was one of the small group of advisers [1] of the subcommittee of the Committee on the Judiciary to which the bill was referred. In the thoroughgoing revision of the bill these experts had a large part. And so one may say, paradoxically yet with truth, that the new law, to which the book is a footnote, is a footnote to the book!

It was only after a legislative struggle of more than four years, marked by extended hearings [2] and much controversy between clashing interests,[3] that the Federal anti-injunction bill finally was passed.[4] When the Frankfurter-Greene volume was published early in 1930, the substitute Shipstead bill was still in the legislative pot. A few months later it was reported out adversely.[5] Adverse criticisms of the bill prompted Messrs. Frankfurter and Greene to supplement the analysis contained in their book with an article in which they

[1] The others in the group, as listed in an official report of the Committee on the Judiciary, were: Herman Oliphant, The Institute of Law of the Johns Hopkins University; Francis B. Sayre, Harvard Law School; Edwin E. Witte, Chief of the Legislative Reference Library, Madison, Wis., and Donald R. Richberg, attorney, Chicago. *Report No. 1060, pt. 2* (*71st Congr., 2nd Sess*), p. 5.

[2] See especially the report of hearings held in February, March and December 1928: *Limiting Scope of Injunctions in Labor Disputes. Hearings before a sub-committee of the Committee on the Judiciary, U. S. Senate, 70th Congr., 1st and 2nd Sessions, on S. 1482* [Shipstead Bill] (Washington, U. S. Govt. Ptg. Office, 1929. 5 parts, 938 pp.)

[3] Majority report against substitute Shipstead Bill (*71st Congress, 2nd Sess., Report No. 1060*, June 20, 1930); minority views, reported by Senator Norris, favoring substitute bill (*71st Congr. 2nd sess., Report No. 1060* pt. 2); majority report by Senator Norris, favoring *revised* substitute Shipstead Bill (*72nd Congr., 1st Sess., Report No. 163*); minority views, against *revised* substitute Shipstead Bill (*72nd Congr., 1st Sess., Report No. 163*, pt. 2).

[4] This legislative campaign to restrict the use of the labor injunction by the Federal courts began with the introduction by Senator Shipstead of his original bill (8 lines long), the idea of which was probably suggested by Andrew Furuseth of the Seamen's Union. It culminated on March 23, 1932, with the approval by the President of the revised, substitute Shipstead Bill, which was passed as the Norris-LaGuardia Act (S. 935).

[5] *Supra*, note 3.

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replied at some length to the arguments of the hostile majority of the committee.[1]

The fact that Frankfurter and Greene rest their analysis and appraisal chiefly upon cases from three selected jurisdictions—the courts of the United States, of Massachusetts and of New York—by no means warrants conclusion that their volume does not set out the problem in reasonable fullness. The records of the highly important industrial states of New York and Massachusetts (especially since the former jurisdiction represents the liberal, and the latter the more conservative, trend of judicial opinion in these matters) are sufficient to reveal without distortion the pattern of policy and practice followed in the state courts. But the authors have given us much more. Even in their discussions of the substantive and procedural problems, although illustrative material is confined to the three jurisdictions, citations range through forty-nine; in dealing with legislation the authors cover the Union, citing apparently all of the relevant statutes, Federal and state,[2] and the important cases under them. The whole story is abundantly documented.[3]

[1] "Congressional Power over the Labor Injunction", 31 *Col. Law Rev.* 385 (1931). As an appendix to the article there is reproduced (at 412) the revised substitute Shipstead Bill (S. 2497) the text of which is even more nearly identical with the now existing law than was the version which appears as Appendix IX in *The Labor Injunction.*

[2] Except that they do not mention the Montana statute: Rev. Code, 1921, § 9242, par. 8.

[3] The sixty pages of appendices contain valuable statistical and documentary material. It may be noted, however, that the tabular lay-outs of New York labor injunction cases in Appendix III are incomplete and contain numerous errors of detail. The incompleteness of the data is fully recognized by the compilers, who made no pretense of going beyond the regular law reports and corresponding matter in the *New York Law Journal.* Moreover, they went no further back than 1920. The incompleteness of their data for the period 1923 to 1927, however, is sufficiently marked to warrant notice. Basing their statement, presumably, on the data shown in Appendix III, they report at p. 51, "fifteen labor [injunction] litigations for the quinquennium" reported in the regular law reports from "the inferior courts of New York [State]" plus "forty-eight additional" cases arising in (or near) New York City and reported in the *New York Law Journal.* The present writer's record of the New York cases of this type shows for the same five-year period 34 cases reported in the regular law reports, 68 New York City cases reported only in the *Law Journal* and 112 unreported cases. Frankfurter and Greene, in fact, have not 15, but 20 regularly reported New York cases, since 5 of the cases in the list of those reported only in the *Law Journal* are reported in

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III

The authors consider, as they must, both (1) the ritual in which injunctive orders germinate, the process of issuance, procedural problems, the lawyer's objective law of injunctions, and (2) the nature of the acts which the orders forbid, the substantive aspect of the problem. They also deal, comprehensively, with past and passing efforts to modify injunctive procedure and to change the substance of the law respecting the forms of conduct commonly sought to be inhibited by the injunctive process. It is sometimes urged that the problem of the labor injunction is wholly one of procedure; certain types of conduct are declared by the state to be wrongful or unlawful, e. g. restraint of trade, by statute; picketing in absence of a strike, by court decision (common law). There is of course a problem of substantive law—changed conditions may suggest the question whether the law regarding restraint of trade or picketing in absence of strike should not be altered, by repeal, or by overruling decision; but it is said to be a problem separate from

the law reports (cases numbered 25, 37, 43, 45 and 48). Perhaps it should be noted that two of the 48 cases (Nos. 17 and 33) in Appendix III A appear to have arisen out of labor controversies between locals and parent unions. Complete accuracy in records of this sort is very difficult, if not impossible, of attainment. Notice is taken of a few errors which might have been avoided. (1) Appendix III A: the defendant in case No. 2 was the American Cloak & Suit Mfrs. Assn., not the American Cloak Union. Case No. 27 appears to be merely a subsequent motion in the litigation of Case No. 24, the motion "denied" being, not one for an injunction, but a motion made by plaintiff to have the terms of an injunction already in force made more stringent. (2) Appendix III B: Case No. 1, affirmed on appeal, 182 N. Y. S. 953; Case No. 6, motion granted in form of *ex parte* order but vacated on hearing. Case No. 10, temporary injunction granted and affirmed on appeal. Case No. 28, *ex parte* order vacated, 194 A. D. 913. Case No. 30, affirmed on appeal, 215 A. D. 772. Case No. 33, *Exchange Bakery v. Rifkin,* temporary injunction granted, vacated on trial, vacation reversed on appeal to Appellate Division and finally affirmed by the Court of Appeals. Case No. 34, on hearing *ex parte* order continued in modified form but vacated upon trial. Case No. 35, affirmed on appeal, 218 A. D. 705. (3) In the text (at 93) the statement of the judicial disposition of the case of *Bossert v. Dhuy* is inaccurate. An *ex parte* order was granted in October 1911, continued as a temporary injunction Dec. 11, 1911, made permanent in May 1913, affirmed by the Appellate Division in November 1914, and, as the authors state, set aside by the Court of Appeals in October 1917. The citation in Note 49 to *Bossert v. United Brotherhood,* 77 Misc. 592, is an opinion in an ancillary contempt action and does not refer to the granting of the temporary injunction, on which no opinion was reported, the *ex parte* order evidently having been continued without opinion.

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that of the respective merits of different procedural devices for law enforcement. So long as these statutory or judicial declarations stand, it is argued, the duty of public officers is to enforce them—by criminal prosecution, by civil action for damages, by the equitable process of injunction; the problem, then, is whether or not the device of injunction is a satisfactory implement; and if it is not, whether, and how, it can be made over into a satisfactory implement; or whether it should be discarded entirely as an instrument for enforcing in labor-dispute cases what is assumed to be the definitely known law.

There are serious difficulties involved in this view of the matter: In the first place the law is *not* definitely known. There is very little legislation dealing with the range of conduct that comes in question in labor disputes and much of what there is, is ambiguous, e. g. the Clayton Act, Sections 6 and 20. Most of the "law" in this field, then, is the law made by judges. Much of this judge-made law is conflicting and contradictory, much of it indefinite. In the second place the bulk of the common, or judge-made (in contrast to the statutory) substantive law of industrial relations consists of decisions made in labor injunction cases. In the third place the injunctive orders framed in accordance with these decisions are themselves laws. They commonly bind relatively small groups of citizens, but they bind them the more stringently in that those bound must obey under penalty of punishment for contempt of court, usually without the protection of jury trial. Moreover the all-too-common "blanket injunction" addressed to "all persons whomsoever", on its face, at least, binds multitudes. Nor can it be said that these laws which take the form of injunction orders are always mere transient inhibitions, evanescent in comparison with the permanently binding statute. The final or "permanent" injunction "perpetually and forever" restrains, or seeks to restrain (or *govern* as all law governs) those who are subject to its jurisdiction.[1] The

[1] There is room to question whether "permanent" injunctions are, as a matter of fact, permanent. The courts differ: In *Bloss v. Tocke* (non-labor), (1875) 59 Mo. 174 the court, in holding that the final decree (of permanent injunction) made the matter *res judicata*, imputed real perpetuity to the order. In *Larson v. Minn. N. W. Ry* (non-labor), (1917) 136 Minn. 423 it was held that the court issuing a permanent injunction may later alter or amend it and it was implied that it might even annul it. See note, "Are All Permanent Injunctions Temporary?" in 23 *Mich. Law Rev.* 382 (1925) where the foregoing and other cases are cited, and where it is pointed out (at 383) that in patent cases injunctions, though permanent, must expire when the patent ex-

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temporary injunction, moreover, is not less binding for the fact that it is tentative. Indeed it may continue in force for years, long outliving the controversy which precipitated it.[1]

These aspects of the problem are fully recognized by Frankfurter and Greene. They devote a long introductory chapter, on "the allowable area of economic conflict", to showing how indefinite and largely unknowable is the range of conduct allowable to parties to industrial conflicts. At other points in their discussion we note recognition of the law-like character of injunctive orders. They tend to expand into "enveloping code[s] of prohibited conduct, absorbing *en masse* executive and police functions, and affecting the livelihood, and even lives, of multitudes";[2] they are "made the occasion for a code of conduct governing the whole community".[3] They are not, like routine orders to commit, or to show cause on return day (unless, indeed, the latter carries within itself an injunctive order), instrumental aids to enforcement of what is written on the statute book or in the common law; they are often both the procedural instrument and (as is best illustrated in the case of mining villages) the *law* for the indefinite future, "permanently and

pires. Frankfurter and Greene impute an element of transience to the permanent injunction: "An injunction continues in force so long as the controversy that evoked it remains unsettled" (at 126). They might well have added that permanent, and even temporary, injunctions may continue in force long beyond the time of settlement of the controversies that evoked them, as happened in the Wil-low and United Restaurant cases cited in the next footnote.

[1] Two recent New York cases are in point: *United Restaurant Owners Assn. v. Kramberg* (1932) 87 *N. Y. L. J.* 376 and *Wil-low Cafeterias v. Kramberg* (1929) 237 N. Y. S. 76 (134 Misc. 841). Defendant Kramberg in both cases represented the Hotel and Restaurant Workers Branch of the Amalgamated Food Workers. The strike began April 4, 1929; it had petered out before the end of the following summer. The Hotel and Restaurant Workers Branch went out of existence in 1931, some of its members, including defendant Kramberg, joining a new organization called the Food Workers Industrial Union. Before the middle of April 1929 preliminary restraining orders were in effect; on May 17 temporary injunctions issued. In January 1932 after the temporary injunction in the Restaurant Owners case had been in effect for two and a half years, the case was tried and a "permanent" order signed on April 13, 1932, almost exactly three years after issuance of the temporary injunction order. The Wil-low case was tried on April 27 and 28, 1933 (after the temporary injunction had been in effect nearly four years) and a permanent injunction signed on June 8, 1933. The writer has been told that on at least one occasion in 1931, one or both of these two-year-old injunctions were waved over the heads of Kramberg and his fellows by restaurant owners.

[2] *Op. cit.*, at 200.

[3] *Ibid.*, at 126.

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perpetually" regulating at crucial points the conduct of large numbers—sometimes the great majority—of the citizens of a community.

IV

These disconcerting developments of a device of such "modest beginnings" as marked the origin of the equitable instrument of injunction should not occasion surprise when one considers the anomalous, almost absurd, legal situation that is created when the ancient remedy of injunction, developed in an economic setting utterly different from the modern pattern and specialized for use in controversies fundamentally unlike labor disputes, is brought to bear upon such disputes under the (Federal and state) constitutional limitations which now control in the United States, in the absence, for the most part, of statutory regulation, and in industrial communities wherein conflicts of interest are conflicts not between individuals but between groups of property-owners and groups of laborers, and wherein competition, where it has escaped eclipse by combination, is predominantly between groups rather than between single, natural persons. These matters are central in the authors' discussion of the "allowable area".

Reference has been made to the number of injunctions that have been issued in the United States. Figures shortly to be cited indicate that not fewer than 2500 have issued from our state and Federal courts. Dr. Edwin E. Witte says that he has record of 2095 petitions for labor injunctions, of which 1872, or 89 per cent, were granted.[1] Several writers have stated, as noted above, that some 300 Federal orders were issued in connection with the shopmen's strike of 1922. Professor C. O. Swayzee, of the University of Nebraska, and the present writer have listed 940 cases (including many not included in Dr. Witte's record) from the state courts of New York State.[2] Frankfurter and Greene state[3] that the Massachusetts Bureau of Statistics reported "more than 260 cases" for the period between 1898 and 1916. Unfortunately, the great bulk of the cases, Federal and state, are unreported. Witte's inquiries have convinced him that there probably are five times as many[4] cases unreported as are re-

[1] Summarized from Witte, *The Government in Labor Disputes*, at 84. His record closes at May 1, 1931.

[2] This record closed with the year 1932. For some of the material utilized at this point see Brissenden, "Campaign against the Labor Injunction" (1933) 23 *American Economic Review* 42.

[3] *Op. cit.*, at 51.

[4] Witte, *op. cit.*, at 84.

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ported. Only 18 of the 260 Massachusetts cases appear in the law reports. Obviously there may be many more cases in all jurisdictions that have never come to light.[1]

If the New York State cases are typical, about one labor injunction in eight is made permanent, by trial or stipulation. There are now in force in New York State at least 85 permanent injunctions. Reckoning in Federal cases there are doubtless several hundred final orders now in effect in the United States. The number of *cases* (i. e., labor dispute litigations involving application for injunction) in New York State has averaged 50 per annum since 1919; it has not fallen below 50 in any year since 1925, when there were only 24 cases; in 1932 there were slightly more than 100 applications, nearly all in New York City. Evidently several hundred new applications are made in this country each year, adding possibly half a hundred a year to the number of permanent orders already extant.

Frankfurter and Greene are of the opinion that far more labor injunctions have been issued from the Federal than from the state courts. "Through claims of . . . diversity [of citizenship]", they say,[2] "probably two-thirds of the labor cases now find their way into the Federal courts"; and in their article on "Congressional Power over the Labor Injunctions"[3] they remark that "the Federal

[1] If we should assume that the prevalence of labor injunctions in the United States were roughly in proportion to the non-farm population, New York's proportion being 17 per cent, with 600 known state-court labor injunctions, it would seem that the number of state-court orders might run to about 3500. If Federal labor injunctions are one third as numerous as state orders (as Dr. Witte's data indicate), one might add 1100 as the *guessed* number of Federal injunctions, making a total of 4600. But estimation along these lines probably exaggerates. Labor injunctions are less to be identified with *industrial* communities, simply, than with those industrial communities wherein unionism is in some degree established. We have no data to show the extent of union organization in the various states. But we know that Massachusetts, New York, New Jersey, Pennsylvania, Illinois, Ohio and Connecticut represent highly industrialized communities in which trade unionism has appreciable strength. On the basis, then, of fairly definite knowledge of the proportions of the problem in New York and Massachusetts, it is thought likely that not less than 2500 labor injunctions must have come out of the states above mentioned. How many more in these states and how many have been issued in the other states it is impossible to say. We only know that there are some reported cases in nearly all the states. There are cases, state or Federal, reported or unreported, from every state in the union except South Carolina (Witte, *op. cit.*, at 84). McCracken's study of the strike injunction in the new south (*op. cit.*, p. 12) reported nothing from that state.

[2] *Op. cit.*, at 210.

[3] (1931) 31 *Col. Law Rev.*, at 390.

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judiciary has for decades set the pace . . . in the abundance of labor injunctions . . . " The present writer doubts the validity of these conclusions. The evidence seems to indicate that these orders have issued much more numerously from the state than from the Federal courts. When the Norris-LaGuardia bill was unfavorably reported out in June 1930, the majority report of the committee stated that the hearings on the bill had disclosed " that the great volume of labor injunctions is not to be found in the [Federal] courts . . ." [1]

Of Dr. Witte's total of 1872 injunctions only 508 are Federal cases.[2] In 1931 in the New York counties constituting the Southern (Federal) District of New York, there were 29 applications to the state courts for labor injunctions. Examination by the present writer of the motion calendars in the office of the clerk of the Federal court for that district revealed only one application. There is ground for the belief however, that though the Federal writs may be fewer in number, they may be said to constitute the more serious problem, in view of (1) the undoubted fact that, at least down to 1932 and the Norris Act, they have tended to be more drastic in their terms than the state injunctions and (2) the probability that the typical Federal order binds larger bodies of workmen by its prohibitions than do most state injunctions.

V

It has been intimated that the severest criticism of the labor injunction has referred, not to the nature of the acts enjoined or even to the fact that the injunction rather than some other remedial device has been used, but to the *manner* of issuance. Such criticism is not limited to the labor cases; nor is it a recent development. Frankfurter and Greene cite vigorous attacks upon the instrument and its use, running back to the 'nineties—and forward to date—in legislative debates, in official hearings, at labor conventions, in the labor press, etc. But procedural practices were sharply criticized long before the year 1875 had produced the pioneer American labor dispute injunction case of *Müller v. Grantz*.[3] In his message to the New York legislature in January 1858, Governor Jno. A. King, referring to the use of the extraordinary remedy of injunction, had this to say:

[1] *Report No. 1060, 71st Congress, 2nd Sess.*, at 14.

[2] Witte, *op. cit.*, at 84.

[3] *Supra*, p. 414, note 2.

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> . . . as now practiced our judges in a discretion not always wisely exercised have nearly converted into an every-day remedy what is designed, and has heretofore been regarded as an exceptional intervention, staying . . . the extreme rigor or supplying the deficiencies of the common law . . . To remedy this state of things it is suggested that it be provided for the future: (1) that no injunction be granted *ex parte*, (2) that no injunction be granted except where the injury apprehended would be irreparable, and could not be compensated in damages . . . (3) security might be required for the payment of damages to the party enjoined, in case the process should appear to have been improperly obtained.[1]

When in the third quarter of the nineteenth century the injunctive remedy was first applied to labor controversies, it does not appear that Governor King's suggestions had yet been heeded. In 1885 the *New York Daily Tribune* published an "Appeal to the Legislature" about the "misuse of injunctions". The appeal was signed by a number of "well-known citizens", including Cyrus W. Field and Henry Clews. Their petition ran, in part, as follows:

> The undersigned . . . beg leave to represent: that the misuse of injunctions, as legal process has become not only an intolerable evil but a public scandal . . . [After stating the conditions of issuance of injunctions the petitioners continued] We believe these conditions every one of them have been violated; the injunction has been granted without any complaint at all; . . . without any positive statement upon oath; it has been granted when, even if the statements were true, they would not justify [restraint] . . . ; it has been granted when a final injunction without any provisional remedy, would have given all the relief needed; and it has been granted without adequate security . . .[2]

The procedure now generally followed is set out in compact form by Frankfurter and Greene in the following language:

> A complaint (bill in equity) starts the machinery. Besides the unlawful interference or threatened interference with some right of the plaintiff, the complaint relies on one or more of the recognized formulas for equitable jurisdiction—that the damage will be irreparable, that the remedy at law is inadequate, that the interference threatens to continue, or involves multiplicity of actions. This is sworn to by the plaintiff of his own knowledge or to the best of his information and belief, buttressed at times by affidavits of witnesses. The complaint is accompanied either by a notice to the defendant that a motion for a preliminary injunction will be made to the court at a stated time, or by a court order requiring defendants to appear on a set date and show cause why a temporary injunction should not issue, restraining them from pursuing

[1] State of New York, 5 *Messages from the Governors* 56-57.

[2] *New York Daily Tribune*, Feb. 12, 1885, p. 3, col. 1.

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the conduct alleged until a final determination upon the merits. If, however, the complaint indicates that the danger of irreparable injury is too imminent to risk delay, a temporary restraining order may issue forthwith until a hearing can be had. The first hearing is not final; it is intended merely to enable the judge to estimate the probabilities of the situation. Proof is made by affidavits from both sides. Before final disposition, the testimony of witnesses is rarely invoked. At all hearings, preliminary and final, the judge determines the facts without a jury; the constitutional guarantee of trial by jury does not extend to suits in equity. Interlocutory orders may be tested by direct appeal, or collaterally by an appeal from a conviction for contempt. On direct appeal, abuse of discretion alone is reviewed; while in proceedings for contempt only the court's power in issuing the injunction may be challenged. Proceedings in contempt of the injunction are had before the judge who granted the decree, again without a jury to pass on the evidence, frequently upon affidavits in lieu of testimony subjected to cross-examination. Punishment is at the discretion of the judge, and has ranged from a substantial fine to months in jail.[1]

The principal points of criticism of this procedure are (1) that contemnors of injunctive orders are tried without jury;[2] (2) that injunctions may issue (in the form of preliminary restraining orders) without notice to the defendants; (3) that defendants have no opportunity at preliminary hearings to confront and cross-examine witnesses or to put on witnesses of their own, the issue being decided in other words on affidavits and (oral and written) arguments of counsel; and (4) that since the majority of these litigations never reach the trial stage, strike and picketing activities are blocked and the struggle foreclosed against the workmen by court orders which are merely provisional but which nevertheless are usually sufficient to crush the strike before the matter can be tried on the merits to determine whether or not the plaintiff employer was really entitled to the relief which already has been accorded him, which relief significantly is usually all the relief he seeks or requires.

In the spring of 1930, shortly after the Frankfurter-Greene volume came from the press, the New York legislature amended

[1] *Op. cit.*, at 54-58. The authors' footnotes are omitted.

[2] In Federal cases it is now provided (Norris-LaGuardia Act, 47 U. S. Stat. L. 70, § 11) that "the accused shall enjoy the right to . . . trial by . . . jury" except in the case of "contempt committed in the presence of the court . . ." Even before the Norris Act the Federal law provided (Clayton Act, 28 U. S. C. § 90) that the contemnor of an injunction might, on demand by him, be tried by jury if the contempt charged was also a crime under Federal statute or under the laws of the state in which the alleged contemptuous acts were committed.

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§ 882 of the Civil Practice Act[1] to prohibit the issuance of injunctions without notice in all classes of cases—labor and non-labor. The Norris-LaGuardia Act has circumscribed the use of *ex parte* orders in Federal jurisdictions. It provides, in Sec. 7, that no injunction may issue "except after hearing the *testimony of witnesses*" except "that if a complainant [alleges] . . . that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to [his] property will be unavoidable, such a temporary restraining order may be issued *upon testimony* . . ." but "shall become void at the expiration of five days." In most of the state jurisdictions *ex parte* issuance of labor injunctions continues to be a matter of conventional judicial routine. The pervasiveness of the *ex parte* injunction habit may be indicated by the results of analysis of 441 applications for labor injunctions in actions arising in New York before 1930. Three hundred and three of these applications—68 per cent of all—were granted immediately by show cause orders containing *ex parte* injunctions. The data on New York cases which Frankfurter and Greene present in their Appendix III do not include information as to which cases were marked at the beginning by *ex parte* orders. The court records reveal that 26 of the 37 regularly reported cases listed in Appendix III B[2] began with *ex parte* orders.[3] Of the 48 cases in Appendix

[1] The New York statutory amendment requiring notice (C. P. A. Sec. 882 as amended by Laws 1930 c. 378) became effective Sept. 1, 1930 and has been construed in two cases: In *Hunt v. Stirone* (intra-union case) (1931) 232 A. D. 262, denial of motion, made on return day of an *ex parte* show cause order, to set aside the *ex parte* clauses of that order, was affirmed by a divided bench, the majority opinion remarking that "the defendants clearly had notice on the return day of the order to show cause". Notice to one who is to be hanged, delivered at the moment the trap is sprung, is more than adequate! In *Stuhmer Co. v. Korman* (1932) 257 N. Y. S. 140 (A. D. 2nd D.) rev'g (1932) 256 N. Y. S. 253 (143 Misc. 246), it was said *per curiam*, two justices dissenting, that "'notice' required by statute means formal notice of application . . . returnable forthwith or at such time as the judge may direct in his discretion".

It appears that prior to 1929 only the state of Kansas (Gen. Stat. 1923, § 60-1104) had prohibited the use of *ex parte* orders in labor (or other) cases. Since 1929 three states besides New York have legislated on the subject: Minn. L. 1929 c. 260 (restricts as in Norris Act but with no time limit); Pa. L. 1931, Act 310 (prohibits in labor cases only); Wis. Stat. 1931, § 133.07 (2) (prohibits in labor cases only).

[2] Appendix III B, made up of New York State labor injunction cases reported in the regular law reports from 1920 to 1927, is an incomplete list of such reported cases. (*Supra*, p. 421, note 3.) Among the cases omitted are the following: *Coon Co. v. Meinhard*, (1920) 183 N. Y. S. 713; *Utz & Dunne*

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III A[1] (in most instances reported only in the *New York Law Journal*) 22 are shown by the court records to have been marked at the outset by *ex parte* restraint.[2]

Co. v. Sheridan, (1923) 201 N. Y. S. 46; *Willson & Adams Co. v. Pearce*, (1927) 219 N. Y. S. 940; *Salitra v. Borson*, (1926) 215 N. Y. S. 332; *Manker v. Bakery Workers*, (1927) 221 N. Y. S. 106; and *McGrath v. Norman*, (1927) 223 N. Y. S. 288.

[3] The 11 cases in which no *ex parte* orders were granted were Nos. 4, 7, 8, 9, 14, 15, 17, 23, 26, 31 and 33. It may be noted that in not one of the 37 cases in Appendix III B did an injunction in some form sooner or later fail to issue. As noted, in 26 cases injunctions issued immediately as *ex parte* orders and in only 5 of the 26 was the *ex parte* restraint later upset without still later re-instatement on appeal or trial; in 10 of the 11 cases in which restraint was not imposed *ex parte*, it supervened after hearing. In the single case (No. 23, *Altman v. Schlesinger*) wherein restraint was not imposed either *ex parte* or after hearing, it was granted on appeal after having been denied upon trial. In 8 of the 10 cases wherein temporary injunctions issued on hearing, but without prior (i. e. *ex parte*) restraint there was no further action; in one of the 2 remaining cases the temporary injunction was vacated on appeal, without a trial having been had; and in the other (No. 33, *Exchange Bakery* case) it was vacated on trial, reinstated on appeal to the Appellate Division and finally vacated again on appeal to the Court of Appeals.

[1] This list evidently is intended to include the cases from the "inferior courts" (i. e. Special Term of the New York Supreme Court) reported only in the *New York Law Journal* between 1923 and 1927). It is very incomplete. Indeed, it appears that almost, if not quite, as many cases are omitted as are included. Among those omitted are the following, with the *Law Journal* dates: *Wincelberg v. Retail Grocery Clks.*, 10/26/23; *Freilich v. Fleischer*, 6/21/23; *Laitman v. Wiener*, 1/22/24; *Manhattan S. D. & S. Wks. v. Cohen*, 6/10/24; *Moskowitz v. Borzekowsky*, 2/27/26; *W. & H. Coffee Pot v. Day*, 7/17/26; *Pak-It-Rite P. B. Co. v. Caiola*, 11/11/26; *Sanders v. Kaplan*, 1/4/27; *Eatmore Bakeries v. Schochet*, 1/22/27; *Corona Shoe Co. v. Shoe Workers*, 6/1/27.

[2] Cases Nos. 3-5, 8, 10, 15-16, 18, 22-23, 26, 28, 31, 36-40, 43-45 and 47. Of the remaining cases two (Nos. 17 and 33) are not labor-dispute cases and two (Nos. 24 and 27) merely represent the same case (*Belle-Maid v. Sigman*) being merely different stages of the same litigation. In only 6 of the 48 cases did an injunction in some form fail to issue. As Frankfurter and Greene remark, in 35 of the 48 cases injunctions *pendente lite* issued. Seventeen of these 35 actions had begun with *ex parte* orders; in 5 of the 13 cases in which no restraint was imposed after hearing, *ex parte* orders had been in effect, being vacated after hearing. Referring to the 35 cases in which temporary injunctions issued on hearing, the authors say (at 79), assuming "that any appeal from these orders would be found in the official reports", that "in no instance was there further *lis*". There seems to be some doubt as to the validity of the assumption. At any rate there were further proceedings in no less than 8 of the 35 cases. Most of this later litigation seems not to have had its results embalmed in the reports. In *Markowitz v. Sigman*,

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The principal reason advanced by employers against the abolition of *ex parte* injunctions in labor cases and by many lawyers and business men in favor of such orders in non-labor cases is that if no such *ex parte* relief is available the plaintiff will be likely to suffer irreparable loss before he can get relief. This argument is most impressive in respect of controversies marked at the outset by the use of violence, threats of physical assault, destruction of physical property and threats that such violent tactics will again be resorted to. This consideration seems less weighty when it is recalled that though notice be mandatory, it may be made as short as the judge believes the emergency requires. In some cases in New York since the statutory abolition of *ex parte* orders notice has been fixed at a few hours.[1] But notice may be made so short that defendant (lacking time to retain and advise with counsel and prepare his defense) may be robbed of the substance if not the form of that protection which presumably was intended to be guaranteed by statutory abolition of *ex parte* orders.[2] Certainly the bare notice that you

Hoe v. Keppler, Kayser v. Moore, Leeds v. Lewis and *Rosenbaum v. Freedman*, trials and permanent injunctions followed the temporary orders, but without report in any instance. More squarely to the point is *United Baker Workers v. Messing* wherein the *interim* injunction was affirmed on appeal and thereafter vacated after trial, apparently without either the appeal or trial proceedings leaving a trace in the reports. In *59th St. Co. v. Musicians* the *interim* order was affirmed on appeal and reported (1927) 219 A. D. 809; and in *Kurtzman v. Cohen* it was "reversed" to prohibit all picketing (which is taken to mean that it was affirmed and made more sweeping), and reported in (1927) 220 A. D. 707. In 3 of the 13 cases in which *interim* orders were refused (and which are also listed in Appendix III A) there were further proceedings: In *Jeanette v. Ninfo* the denial of *interim* relief was affirmed on appeal, but apparently not reported; in *Carnation Co. v. Basson*, the order denying *interim* relief was reversed on appeal and such relief granted (reported [1926] 216 A. D. 769); in *Bolivian Co. v. Finkelstein* a subsequent trial resulted in dismissal of the complaint, without report.

[1] One case in point is *Kingsboro Plastering Co. v. Lyons*, unreported (file # 1844 of 1932, Kings Co., N. Y.) The bill was dated Feb. 1, 1932. A show cause order was signed by Justice Strong the next morning. He fixed 2 o'clock that afternoon as the return *hour* and required service before 11:30 that morning. Service was effected at 10:55 a. m. At the return hour plaintiffs appeared and as a notation on the pleadings showed, "Defendants [were] called: 2 p. m., 2:15 p. m., 2:30 p. m. No answer". Thereupon on the afternoon of Feb. 2, after this brief notice, a second show cause order was signed, this time containing a preliminary restraining order, and the return day fixed for Feb. 3 at 10 a. m. (Service to be by 6 p. m., Feb. 2; actually made, 4:10 p. m.) At 10 a. m., Feb. 3 the hearing was duly held.

[2] The Wisconsin statute (*infra*, p. 446, n. 2) guards against this danger by

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are to be enjoined, without opportunity to be heard, is an empty and meaningless privilege.[1]

There has been much vigorous opposition to the New York statute requiring notice, emanating from employers in labor cases and from others in relation to non-labor cases. In commercial cases the need for *ex parte* relief may be even more crucial than it often is in labor cases. Moreover, in the non-labor cases there is less likelihood that harm will be done to defendants since tentative restraint in such situations usually does no more than hold matters *in statu quo*, which seems seldom if ever to be the fact in labor-dispute cases.[2]

A feature of the equitable theory underlying injunctions that has crucial importance in the class of cases here considered is the nature of the assumption regarding the effect upon the dispute-situation of provisional or tentative restraint, in the form either of *ex parte* or temporary injunctions. The assumption is that such *interim* orders hold the elements of the situation in *statu quo* pending final determination upon the merits. It doubtless holds good in most of the non-labor situations to which the injunctive remedy is applied. An *interim* injunction which prevents A from cutting down a tree on land which he believes is his, but which is also claimed by B, may fairly be said to maintain the *status quo* between the parties until the fact of A's title is determined upon trial. No harm would be done to A even though it were later determined that the land did belong to A and that B therefore was not entitled to injunctive relief. In the typical labor-dispute situation the *status quo* assumption is negatived by the realities of the controversy. Labor-power is a commodity [3] unique among commodities in that, unlike the goods

providing that notice "in no case [shall be] less than 48 hours. . . ." As Frankfurter and Greene point out (at 187), Wisconsin "makes the strictest requirement for the elimination of the *ex parte* evil". Joseph A. Radway, general counsel Wisconsin State Federation of Labor, testified regarding this feature of the Wisconsin statute: " . . . opponents of the measure . . . contended that there would be irreparable damage if the courts should have to wait 48 hours. 'Why' they said 'in 48 hours' time they can destroy the plant'. Well, we have had that act on our books now . . . for about three years. We have had some strikes and they have not proven disastrous at all". *Hearings before a sub-committee of the Committee on the Judiciary, U. S. Senate, 70th Cong. 1st Sess., on S. 1482,* at 562.

[1] *Cf. supra,* p. 430, note 1.

[2] It is, perhaps, significant that rarely, if ever, has *ex parte* relief been granted in labor injunction cases in which the union appears as plaintiff.

[3] The declaration (in § 6 of the Clayton Act) that "the labor of a human being is not a commodity or article of commerce" and similar rhetoric by

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which figure in non-labor cases, it cannot be sequestered, preserved and delivered later. The laborer when he sells his services must, as Professor Commons has remarked, deliver himself on the job with what he sells.[1] It is therefore fantastic to talk of maintenance of the *status quo* in labor cases. In these cases the relations between the parties are inevitably—and quickly—altered. The balance of advantage moreover is usually tilted against the union. Strikes are usually won or lost in the first two or three weeks. Many of them run for months, even years. Temporary injunctions, disturbing the *status quo* to the disadvantage of the union, continue in effect (before they are discontinued, vacated or made permanent) about one month on the average. This truth is emphasized by Frankfurter and Greene:

> The situation does not remain in equilibrium awaiting judgment . . . The supervision of activities affects only the strikers; the employer resumes his efforts to defeat the strike and resumes them free from the interdicted interferences. Moreover, the suspension of strike activities, even temporarily, may defeat the strike for practical purposes and foredoom its resumption, even if the injunction is later lifted.[2]

The *status-quo* theory, the core of the justification for imposition of injunctive restraint without full knowledge, must be rejected so far as labor-dispute cases are concerned. This naturally suggests the question whether it is good policy to allow temporary injunctions at all in labor cases. If they are to continue as a feature of equity

labor leaders do not remove from labor-power the commodity character that it must have in a competitive, price-controlled economy wherein like shoes and sealing wax it is bought and sold. The statutory statement would be less fantastic if it declared that labor is not "merely a commodity". The purpose behind the declaration, of course, was to forestall application to those who sold labor-power, the workers, of laws which bore restrictively upon groups engaged in the buying and selling of mere commodities. Possibly labor unions would have been better advised had they frankly accepted the fact that labor-power is a commodity and rested their strategy upon the implications of the other fact that it is something more than a commodity, urging the latter as reasonable grounds for statutory or judicial rules different from the rules applied to ordinary commodities. Such a policy would enable labor consistently to avail itself of rights and privileges incident to property-ownership and possibly at the same time escape certain of the limitations put by law upon *mere* commodities. Certainly such a policy seems to be the more consistent one for those unions which like the Upholsterers and several others, now seem committed to the principle of utilization of the injunction against their employers.

[1] *Legal Foundations of Capitalism* (New York, 1924), at 284.

[2] Frankfurter and Greene, *op. cit.*, at 201.

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practice every possible effort should be made to avoid their issue in doubtful cases and, where they are issued, to bring the case to trial at the earliest possible moment.[1]

To the extent that labor injunctions are issued *ex parte* (and as we have noted they continue in 44 states to be so issued without restriction) the restraint is imposed, as Frankfurter and Greene point out, without any evidence to support it, except such partial and one-sided "evidence" as may be contained in the complaint and complaining affidavits. Where there *is* evidence, the nature of it is generally unsatisfactory, since it rarely proves anything—except that there is a dispute. "Proof", except in the small minority of cases that reach a trial upon the merits, is by affidavits, accompanied by oral argument at the hearing and by briefs, submitted usually subsequent to hearing. It is "evidence in the form of affidavits [that] normally determines the exercise of this [judicial] discretion".[2] Typically they are conflicting, often hopelessly so, defendants solemnly on oath denying what plaintiffs with equal solemnity have sworn to be true, "affidavit . . . pitted against affidavit", complaining affidavits, answering affidavits, replying affidavits monotonously stereotyped (perhaps necessarily so), sometimes perjured, usually drafted by counsel and sometimes signed perfunctorily without read-

[1] In New York City the importance of the prompt trial of this type of action has so much impressed the judges of the Supreme Court that special calendar rules have recently been adopted in the First and Second Judicial Districts (New York City and nearby counties). The Appellate Division, First Department, amended Rule II of the Special Term rules in New York County, by adding a new paragraph, effective Sept. 1, 1931, which reads as follows: "where an application is made for an injunction *pendente lite*, after answer . . . the court may . . . on consent of the parties, dispense with notice of trial, and order an immediate trial of the action . . ." (*Bender's Lawyers' Diary*, 1932, at 387). On Oct. 28, 1931, the Appellate Division, Second Department, adopted a similar rule, applicable to labor-dispute cases only and incorporated in the Kings County Supreme Court rules as amended Dec. 2, 1931, as subdivision "a" of rule 13. It reads as follows: "where an application for an injunction *pendente lite* in a labor dispute is granted or denied, it will be granted or denied upon condition that the prevailing party consent that after answer the case be set down for immediate trial" (*Calendar Rules and Assignment of Justices of the Supreme Court of the State of New York in the Second Judicial District* 1932, at 9. Effective Jan. 15, 1932, the same rule was adopted by the Appellate Division, Second Department for the Supreme Court of Queens County on Jan. 13, 1932, as subdivision "a" of Rule 12 of that court. These rules have noticeably expedited labor injunction litigation during the past year.

[2] Frankfurter and Greene, *op. cit.*, at 67-68.

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ing, or even knowing the contents; in number, scores of them, commonly, to the case, sometimes hundreds—blizzards of paper oaths. "The most serious complaint that can be made against injunctions, which have become so prominent a part of the law in dealing with strikes in the United States, is the fact that courts have become accustomed to decide the most important questions of fact . . . upon this wholly untrustworthy class of proof".[1]

One phase of injunction procedure to which Frankfurter and Greene give scant, and in this writer's judgment, inadequate attention, is the question of injunction bonds. Since *ex parte* and temporary injunctions are tentative, the merits of the situation being still undetermined, it is always possible that by affidavits the *ex parte* order and by trial testimony the temporary injunction may be shown to have been improvidently issued, or at any rate that plaintiff was not entitled to the relief which he asked for, or *any* relief. Should the plaintiff who gets such provisional relief be obliged to provide security to compensate defendants[2] for loss and damage occasioned by its imposition, if later it transpires that plaintiff was not entitled to the relief? Some states like Kansas[3] leave the answer to this question to the discretion of the judge, there being no statutory requirement that the plaintiff furnish security. The authors quote John W. Davis' citation of "the issuance of injunctions without bond" as one of the "glaring abuses which have crept into the administration of this remedy".[4] In most jurisdictions a bond is required but the amount of it is left to the discretion of the judge. This is true of New York where the amount usually fixed is $250, seemingly irrespective of the nature of the action, the number of defendants and whether defendants are corporations, individuals merely, or individuals representing associations. Some court officials in New York consider that the bond is supposed to be $250 for each defendant and this practice is sometimes followed, but more often it

[1] Amidon, J., in *Great Northern Ry. v. Brosseau* (1923) 286 Fed. 414, 416, quoted by Frankfurter and Greene, *op cit.*, at 68.

[2] It is no doubt true, as the authors point out (*op. cit.*, at 201, note 1) that the (almost always considerable) damages suffered by a union "through the granting of an improvident injunction cannot be fully compensated by bond." It seems important, nevertheless, that the amount of the bond should be enough to cover some substantial fraction of the probable losses incident to improvidently imposed restraint, instead of being, as at present in New York at least, grotesquely out of proportion to these probable losses.

[3] *Ibid.*, at 187.

[4] (1912) 48 *Congr. Rec.* 6436, cited at 185.

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is $250 even where there are a number of defendants. In some cases the bond is fixed at a higher figure (even where there is but one defendant named). Bonds of $1000 or even $5000 have been noted but these large bonds seem to be more common where unions are suing employers for injunctive relief than in the conventional suits against unions.[1] How the apparently sacred sum of $250 came to be settled upon is, to this writer, unknown.[2] The amount is bound to be grotesquely inadequate to indemnify most trade-union locals for the losses incurred when a strike, say, against a wage cut (which a successful strike might have forestalled) is broken up in a fortnight and the cut put into effect as a result of a temporary injunction which on coming to trial a month after issue, was vacated, because of testimony which showed that plaintiff was not entitled to in-

[1] Thus in *Zmurko v. Manhattan W. C. Employers' Assn.* (*infra*, p. 444, n. 2) the bond required of the union was $5000. Here, however, the defendants included a large employers' association and 11 of its corporate members. In *Suttin v. Unity Button Works*, (1932) 144 Misc. 784, File # 29966, N. Y. Co., where the defendant was a single small corporation, the bond was in the conventional amount $250. In New York County, N. Y., in 18 of the cases wherein injunction relief was granted to unions against employers it appears that the amounts of undertaking were as follows: in seven cases the bond was $250, in one case $500, in one case $1500, in one case $2000, in two cases $2500, in four cases $5000, in one case $20,000, in one case $60,000.

[2] The New York Civil Practice Act apparently nowhere specified the amount of the injunction bond. Section 819 provides that there shall be "an undertaking, with sufficient sureties". It adds that "the undertaking shall be to the effect, and in the amount, if any, prescribed by statute relating to the particular remedy". But nowhere has the present writer been able to find a New York statute stating what the amount shall be for the "particular remedy" of injunction. It is true that § 907 of the Civil Practice Act provides that "the sum specified in the undertaking" to be given by plaintiff on obtaining a warrant of attachment "must be at least two hundred and fifty dollars", and it may be that present practice in injunction cases is the result of assimilation of this provision to injunction cases.

That the tradition runs far back is indicated by the language of an editorial on "Abuses of the Injunction System" which appeared in the *New York Daily Tribune* of Dec. 8, 1885, (p. 4, col. 3). Referring to a suit by minority stockholders to enjoin the sale of the West Shore Railroad, the editorial asserted that "no application to the courts [for injunctive relief] was put on until the Saturday before the sale . . . and the injunction was served on Monday." It continues: "Judge Kennedy required a paltry indemnity bond of $250 from the plaintiffs, instead of one bearing some proportion to the vastness of the interests involved. . . . It is the duty of our judges to grant injunctions only after careful consideration of the rights of the defendants as well as those of the plaintiffs. . . . The abuses of our injunction system have been flagrant".

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junctive relief. In such a situation, *if* the case gets a trial and *if* there follows a decree against the plaintiff, the defendant union may have judgment for an amount which in nine cases out of ten does not exceed $250. Since four out of five labor injunction cases never get to trial it follows that in eighty per cent of the cases the defendant has no substantial rights under the bond, even if the temporary order has been dismissed on motion. Thus in the great majority of cases the question of the amount of the bond may be said to be wholly academic, be it one dollar or one thousand.

It is to be stressed that recovery under the bond is possibly only when, after *trial*, there is a final *judgment* to the effect that *plaintiff* is not entitled to the relief sought. When an *ex parte* order marks the beginning of the suit there will normally come a time when on hearing the wisdom of that order will be subjected to the test not of testimony but of affidavits. After that hearing it may be the firm belief of the judge that the *ex parte* order was wrongly issued and, if so, he will vacate it. An injunction has been wrongly issued. It has now on hearing become a matter of judicial conviction that it was wrongly issued and it is vacated.[1] But no bonds (however inadequate in amount) are made available to meet this situation, since the matter is not yet judicially *determined*—i. e. tried upon the merits.

VI

In addition to the procedural abuses that cluster about the process of reaching a decision whether to enjoin or not to enjoin—absence of notice, inadequate security, imposition of tentative restraint on affidavits only and of both temporary and permanent restraint by single judges without juries—there are others often to be found in the text of the injunctive order itself and in the procedure followed in the service and enforcement of it.

It may be directed to (and, therefore, on theory, at least, bind): persons not named in the complaint; persons not named in the complaint and not representatives (attorneys, agents, etc.) of named persons; persons who though named in the bill, have not been served with process or entered an appearance; "all persons having knowledge of the order"; "all persons generally"; "all persons whomsoever".[2]

[1] Analysis (subject to revision) of the disposition of 303 New York labor injunction cases in which *ex parte* orders were granted, shows that 270 of these actions came on for hearing, with the result that in 70 cases (26 per cent of those heard) the *ex parte* orders were vacated.

[2] The authors remark that, "The ductile quality of that final phrase 'all

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It may forbid acts not barred by the substantive law.[1] The authors condense from Dr. Witte's summary of injunction texts:

> There were restraints upon behavior already illegal by criminal statutes, such as force, violence, intimidation and trespass. There were prohibitions upon the calling and the conduct of strikes; upon picketing, sometimes without qualification, but frequently with such limiting phrases as "for the purpose of inducing by threats, violence or intimidation", "in such a manner as to intimidate", "in such a manner as to interfere with the complainant's business". There were restraints against speech, "abusive language", "annoying language", "indecent language", "bad language", "opprobrious epithets",—and against specific words such as "scab", "traitor", "unfair". Federal injunctions prohibited persuasion or inducement "in any manner whatsoever" of employees to break their contracts, or to quit work, or of potential employees to refrain from accepting work. They prohibited parading or marching "near to or in the sight of" the complainant's mines; "boycotting" or "conducting a boycott" likewise were restrained.[2]

In cases where picketing is restrained, it will not do to conclude simply that a lawful act has been enjoined. Sometimes such a conclusion is valid; sometimes it is not. The Federal law expressed by

persons whomsoever' is now conventionally imparted, in one form or another to federal labor injunctions" (*op. cit.*, at 88). It may be added that it also frequently appears in state injunctions. The authors note (*ibid.*) that the Supreme Court of the United States allowed to stand the following words in a Federal injunction: ". . . the said defendants . . . and each of them, and all persons combining with, acting in concert with, or under their direction, control or advice, or under the direction, control or advice of any of them, and *all persons whomsoever* . . ." (*Amer. Foundries v. Tri-City Council*, C. C. A. 7th 1916, 238 Fed. 728, 729). (Italics supplied by the present writer.)

[1] There may be good ground for doubt about the wisdom even of some injunctive inhibitions that are clearly within the law. Such doubts, of course, reflect not at all upon the injunctive device; they suggest simply the need for reëxamination of the statutes and decisions which make up the substantive law of which "on theory, the terms of the injunction are merely formulations. . . . In so far as there is a close correspondence between the specific restraints of a decree and the general law of torts, not the decree but only the substantive law which sanctions it is open to question."—Frankfurter and Greene, *op. cit.*, at 89.

[2] *Ibid.*, at 98-99. Injunction decrees repeatedly forbid the making of "threats" without reference to what it is that is threatened. What one may lawfully do, one may lawfully threaten to do. But in a New Jersey case to which the authors refer, and in which the defendants, refraining from threats, were silent, that silence was "found to be a coercive weapon", the court saying ". . . silence is sometimes more striking and impressive than the loud mouthings of the mob". *Gevas v. Greek Restaurant Workers* (1926) 99 N. J. Eq. 770, 783 (cited at 98).

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statute in the Clayton Act seemed to make it lawful *peacefully to persuade*, but the Supreme Court in the Tri-City case declared that the word picketing necessarily had a militant connotation importing a "necessary element of intimidation", and allowed only a single "representative" at each entrance to the plant.[1] In another Federal case the injunctive order ruled that "persuasion in the presence of three or more persons congregated with the persuader is not peaceful persuasion and is hereby prohibited".[2] In New York picketing is unquestionably permissible under the common law[3] yet it may be and frequently has been prohibited by injunction in cases where it is carried on in an atmosphere of violence or misrepresentation. In such cases both the violent and physically intimidative acts (clearly unlawful) and the picketing (clearly lawful, at least if peaceable) may be enjoined. Although "it is not within the province of the courts to restrain conduct which is within the allowable area of economic conflict"[4] injunctions against all picketing have been sustained where there is violence or misrepresentation.[5]

Vastly more disturbing are the cases—not infrequent—where even in the absence of violence or intimidation peaceful picketing is enjoined in jurisdictions where such picketing is lawful. Naturally cases of this type usually are identified with courts of original, rather than appellate, jurisdiction. Picketing is lawful but has been en-

[1] *Tri-City Central Tr. Council v. Amer. Steel Foundries* (1921) 257 U. S. 184 at 207.

[2] *Clarkson Coal Mining Co. v. United Mine Workers* (D. C. Ohio, Sept. 1927) unreported. Quoted by the authors at 102.

[3] *Exchange Bakery & R. Co. v. Rifkin* (1927) 245 N. Y. 260.

[4] *Stillwell v. Kaplan* (1932) 259 N. Y. 405, 412.

[5] *Exchange B. & R. Co. v. Rifkin* (*supra*, note 3), *Nann v. Raimist* (1931) 255 N. Y. 307, *Steinkritz v. Kaplan* (1931) 257 N. Y. 294. But in the most recent labor case to be decided by the New York Court of Appeals, *J. H. & S. Theatres v. Fay* (2nd action) 89 *N. Y. L. J.* 29 (Jan. 4, 1933) decided Nov. 22, 1931, the doctrine that picketing, though peaceable, may be enjoined if the defendants are guilty of violence or misrepresentation was found less than adequate. The court held, speaking by Lehman, J., that even though the union's agents attempted by misrepresentation and intimidation of prospective customers to destroy the business of the plaintiff company, it should not be restrained from picketing in a peaceable orderly manner, although the intimidation of customers should be enjoined. "An injunction does not issue in such circumstances as punishment for the past. (*Iron Molders Union v. Allis Chalmers Co.*, 166 Fed. 45, 49; Frankfurter and Greene, *The labor injunction*, p. 116). Its only legitimate end is protection for the future . . . (*Nann v. Raimist*, 255 N. Y. 307, 315.)

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joined, if carried on in the absence of a strike[1] and if it involved persuading employees under contract.[2] In a recent New York case the Appellate Division modified a Special Term judgment which allowed limited picketing and ordered that the defendants, who had been picketing the premises of an employer under contract with a rival union, "be restrained from in any manner picketing the plaintiff's premises or interfering with its business". This judgment was reversed by the Court of Appeals and picketing was permitted.[3]

Probably most disconcerting of all are restraining clauses of the omnibus type, of which Frankfurter and Greene cite the following examples: "generally from in any manner whatsoever interfering with the complainant", "from unlawfully interfering", "from doing any and all other acts in furtherance of any conspiracy to prevent the free and unhindered control of the business of the complainants".[4] It is not surprising, when one considers such omnibus categories of acts forbidden, in connection with the fact that sometimes the orders conveying these inhibitions are directed to "all persons whomsoever", that the authors remark "how the

[1] *Stuyvesant L. & B. Corp. v. Reiner* (1920) 110 Misc. 357, 181 N. Y. S. 212; *Yablonowitz v. Korn* (1923), 205 A. D. 440, 199 N. Y. S. 769; *Moreland Theatres Corp. v. Portland M. P. M. O. P. W.* (1932) 12 Pac. 2nd, 333, in which the Oregon Supreme Court construed the state anti-injunction law as allowing an injunction against picketing although it was not marked by violence, since the dispute was not a *bona fide* one.

[2] *Best Service Laundry v. Dickson* (1923) 121 Misc. 416, 201 N. Y. S. 173.

[3] *J. H. & S. Theatres, Inc. v. Fay* (2nd action), *supra.* The Appellate Division order (apparently unreported) was entered July 13, 1932. The case is # 6808 of 1931 in the files of the Clerk of Kings County, Brooklyn. *J. H. & S. Theatres v. Fay* (1st action) was an earlier litigation (between the same parties) in which a temporary injunction was granted. "It is impossible", the court said, "upon the conflicting affidavits submitted, to determine the exact situation herein. It is sufficient, however, that the success of plaintiff's business is seriously threatened and that apparently the defendant is without rights in the premises. In any event, the defendant cannot be seriously damaged if this application is granted since an early trial can be had herein, while to deny the plaintiff this relief may cause irreparable damage" (1931) 84 *N. Y. L. J.* 3301 (Mar. 30). Six weeks later the issue was tried and soon thereafter came a judgment vacating the temporary injunction and this judgment was unanimously affirmed by the Appellate Division (apparently unreported). The case has the same file number as Action # 2, which was brought some months later after the plaintiff had entered into a contract with the Empire State Theatrical Stage Employees' Union.

[4] *Op. cit.*, at 99. Dr. Witte states that "most injunctions include catch-all 'blanket' clauses". *The Government in Labor Disputes*, at 99.

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administration of law by decrees which through vast and vague phrases surmount law, undermines the esteem of courts upon which our reign of law depends" [1]

To some extent these abuses have been corrected by the courts themselves. The expedient of appeal sometimes mends matters. Here, too, much depends upon the judicial personnel of courts of appeal. But since most cases are not appealed the fate of the parties depends primarily upon the individual judges in courts of original jurisdiction. Among thousands are a few who are showing in the cases that come before them what can be done. They have wisely avoided the use of "blanket" phraseology and the use of vague and ambiguous terms generally; recognizing that injunctions are addressed in these labor cases not only to laymen, but to unschooled and often ignorant laymen, they have endeavored to have them couched in plain and simple language, even though that might require much editing of counsel's compositions.[2] They have tried to make it plain to those enjoined not only what it is they are forbidden to do, but just what conduct connected with strike activities they are still free to continue. A few judges, like Amidon, have realized that prohibitions of violent acts on the part of strikers ought to be accompanied by restraints upon the plaintiff designed to prevent him from provoking such acts.[3] The authors cite one of his injunctions: After stating explicitly what the strikers are forbidden to do and what they are permitted to do, the order stipulated that so long as the strikers kept within its terms, the plaintiff railway company was enjoined

1. From using towards them threatening or abusive language or epithets.
2. From inflicting upon them any personal injuries, or attempting to do so.

[1] Frankfurter and Greene, *op. cit.*, at 200.

[2] Except in the writing of opinions, it seems that the judges have but to choose—between the thoughts and phraseology of counsel for defendant and the thoughts and phraseology of his adversary. It would seem no less important that a judge should himself formulate the terms upon which he proposes to enjoin workmen than it is for him to write his own opinions as to why he decided to enjoin them. Many judges do at least carefully edit—or even partially rewrite — drafts which counsel submit, but the impression sticks that more of them sign at the foot without emendation.

[3] The state of Minnesota now requires in the case of *ex parte* injunctions, that both parties be subjected to whatever restraints are imposed. *Cf. infra*, p. 443, note 2.

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3. The armed guards of the plaintiff are enjoined from drawing or exhibiting firearms . . . for the purpose of intimidating pickets . . .[1]

The defendants are entitled to this correlative restraint upon the plaintiff, since the purpose of the injunction is to provide protection, not to furnish, as Judge Bourquin is quoted as saying, "a shelter for aggression."[2]

Violation of an injunction is contempt of court.[3] Examination of the record of contempt proceedings in labor injunction cases shows that the wide inclusion in the decrees of "all persons whomsoever" and also the grandiloquent inhibition to the defendants of "interference in any way whatever" is in a measure a matter merely of gesture since but rarely are persons not parties cited, and still less often punished, for contempt. Yet the law of contempt does provide injunctions with very sharp teeth. The authors point out that if not the whole world, at least the parties to the suit *must* pay heed; that restraints "against representatives of a class bind the class"; that "one who knowingly assists a person named in the injunction to violate it may be held in contempt"; and that "all who have knowledge of a decree must obey it."[4] They report that in connection with the 118 Federal labor injunction cases shown in their analytical table of cases, there were 36 contempt proceedings between 1901 and 1928, "in which approximately 88 persons were convicted and 15 acquitted." They add that 58 of the convictions were appealed with the result that 21 were reversed.[5]

The feature of contempt proceedings which organized labor has assailed most vigorously has been the fact that typically they are without a jury, and before a single judge—usually the very judge whose order is alleged to have been violated. A few jurisdictions, including the Federal, have now enacted legislation providing for jury trial in contempt proceedings.[6]

[1] Quoted by the authors at 122, from *Great No. Ry. Co. v. Brosseau* 286 Fed. 414, 424-425, where the text of the order appears.

[2] *Great Northern Ry. Co. v. Local G. F. L. of I. A. M.*, 283 Fed. 557, 561 (D. Mont. 1922) quoted at 122. In at least one state recent legislation limiting the use of *ex parte* orders provides that in any such orders as are issued "all parties to the action shall be similarly restrained" (Minn. Acts of 1929, c. 260, § 4256).

[3] On the general subject of contempt of court in labor cases see C. O. Swayzee, "Contempt of Court in Labor Injunction Cases" (unpublished MS.).

[4] Frankfurter and Greene, *op. cit.*, at 123. [5] *Ibid.*, at 130.

[6] Norris Act (47 U. S. Stat. L. 70) Sec. 11; N. J. L. 1925, c. 169; Okla.

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It may be noted that within the last five years, during which time suits for injunction by unions against employers or their associations have multiplied,[1] there have been some instances of successful prosecution by the plaintiff unions of contempt proceedings against defendant employers. The *Zmurko* case[2] will serve for illustration. A temporary injunction was granted in this case on April 9, 1931, restraining defendant association and its members from breaching the collective agreement between the parties. It was made permanent on December 21, 1931. The present writer's incomplete notes on the case show that in the twenty months since the temporary injunction was issued the plaintiff union made no less than twenty motions to punish members of the defendant employers' association. Nine of these were withdrawn. In the remaining eleven contempt actions convictions have resulted in seven cases, acquittals in four cases. The convictions resulted in the punishment of eight employers by fines ranging from $25 to $250. The plaintiff's attorney writes that one of the convicted employers "paid the fine after he spent a night in jail".

VII

The long story of legislative effort at Washington and in the several states which Frankfurter and Greene have been at pains to set out in revealing detail is described by them (and with reason) as a history which leaves "an impression largely of futility."[3]

The Clayton Act was emasculated. The half-dozen states[4] which

Const. Art. 11, Sect. 25 & Okla. Rev. L. 1909, Sec. 2229; Pa. L. 1931, Act. 311; Utah L. 1917, c. 68, Sec. 5; Wisc. L. 1931, 113.07 (4). Prior to the enactment of the Norris Act, the Federal law provided for jury trial in contempt cases in which the contemptuous acts alleged to have been done were crimes under law of the United States or of the state in which they were committed. Earlier statutes providing for jury trial in contempt cases in Michigan, Mississippi, Missouri, North Carolina, Ohio, Oklahoma and Virginia were nullified by the courts, as Frankfurter and Greene point out (at 195 and note 245 which cites the cases).

[1] In New York County (Manhattan Borough) there have been no less than 90 suits for injunction brought by unions against employers. Most of these have arisen in the last five years.

[2] *Zmurko v. Manhattan Window Cleaning Employers' Assn., Inc.*, unreported (New York County Clerk's file # 6532 of 1931). The bill named, in addition to the association, eleven of its corporate members. The collective agreement whose violation was the ground for instituting the action was signed by 81 corporate or firm members of the Association.

[3] *Op. cit.*, at 198.

[4] Arizona (statute antedated Clayton Act by one year), New Jersey, Wis-

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enacted laws more or less closely following the Clayton Act have, with almost no exception, seen them either declared unconstitutional (as in Arizona) or "construed", as the Federal law was "construed", into ineffectiveness. The statutes providing for jury trial in contempt cases have been judicially invalidated in all but four of the eleven states which enacted them. In twenty-four states, all but four of which acted long before the Clayton Act was passed, laws were passed prohibiting the discharge of an employee because of union membership and forbidding employers to require workers to sign "yellow-dog" contracts, by which they agreed not to become or remain members of labor unions.[1] "But state courts and later the Supreme Court of the United States denied the power to pass such legislation to states and nation".[2] Violations of such contracts

consin, Illinois, Kansas, Oregon and Washington. Similar legislation, following the Clayton Act less closely, was enacted in Montana, Minnesota, North Dakota and Utah.

[1] The use of "yellow-dog" contracts seems to be at least as old as the labor injunction used to restrain their violation. McNeill (*The Labor Movement*, p. 224) refers to their use in the textile industry in 1875, the year which marks the first recorded instance of the use of the injunction in labor-dispute cases.

[2] Frankfurter and Greene, *op. cit.*, at p. 146-147 and notes 52, 54 and 55, where some of the statutes and invalidating decisions are cited. Of the states which enacted legislation (in terms closely following those of the Clayton Act), limiting equity jurisdiction in labor-dispute cases, four added clauses defining the "status of labor" and withdrawing the right to injunctive relief "in all cases involving the violation of the contract of employment . . . where no irreparable damage is about to be committed upon the property or property rights of either [employer or employee] . . ." (N. D. Acts of 1919, c. 171, § 3; Ore. L. 1920, § 6817; Wash. Acts of 1919, c. 185, § 3; Minn. Acts of 1917, c. 493, § 4). Frankfurter and Greene do not mention the Minnesota statute. They call attention (at 149, note 67) to the fact that the Oregon and Washington statutes "are even more cautious . . . as they permit equitable relief not only in case of 'irreparable damage' to 'property rights' but also to 'personal rights'". This is clearly true of the Washington statute, since § 2 provides that "no . . . injunction shall be granted . . . unless necessary to prevent irreparable damage to property or to a personal right . . .", and § 3 goes on to apply exactly the same reservation to the withdrawal of relief where contract violation is involved. But the Oregon statute is ambiguous: in § 6817, to be sure, it is provided that "in all cases involving the violation of the contract of employment . . . where no irreparable damage is about to be committed on the property, personal rights or property rights of either [of the parties] no injunction shall be granted . . ." But §§ 6815-6816 merely provide in the conventional way that ". . . no injunction shall be granted . . . unless necessary to prevent irreparable injury to property . . . " and nowhere use the word

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by employees, therefore, remained freely enjoinable and have been freely enjoined. More recent legislation designed to cope with anti-union contracts has taken the form of statutory provisions which, instead of making such agreements [1] unlawful, declare them contrary to public policy and void and not a basis for legal or equitable relief. This new legislative strategy, in the initiation of which Frankfurter and Greene did important service, has flowered into law, since their book was published, in the Federal and six state jurisdictions.[2] It already has been noted that five states and the Federal government have recently enacted legislation restricting or entirely prohibiting the issuance of *ex parte* orders in labor cases.[3] Apparently this is the extent of the legislation dealing with *ex parte* orders. All of it was enacted subsequently to the publication of the Frankfurter-

"personal". The implication of these first two sections clearly is that no injunctive relief will be available under any circumstances to protect personal rights, even though they are threatened with irreparable damage. The plain meaning of § 6817 is that if a question of violation of a contract of employment is involved an injunction may issue to protect personal rights from irreparable damage.

[1] The statutes in most instances are broadly phrased to include contracts which specify that neither party may join a labor organization or organization of employers.

[2] Norris Act, 47 U. S. Stat. L. 70; Ariz. Acts of 1931, c. 19, sec. 1360a; Colo. Acts of 1931, c. 112, sec. 1; Ohio Acts of 1931, p. 562; Ore. Acts of 1931, c. 247; N. J. Laws of 1932, ch. 244, par. 2-4; Wis. Stat. 1931, sec. 103-46. Supplemental to the last-mentioned statute is a later provision (sec. 268.19, c. 376, Wis. Laws of 1931) in which an anti-union agreement is "declared to be contrary to public policy and shall not afford any basis for the granting of legal or equitable relief by any court. . . ." These statutes seem to push somewhat farther than does the Norris Act the limitations which they put upon "yellow-dog" contracts, since unlike the Federal law they declare such agreements void. The texts of these statutes are assembled in (1932) 35 *Mo. Lab. Rev.* 86-88, 544-545. The most recent "yellow-dog" statute (that of New Jersey) contains a statement of public policy which closely follows the phrasing of the "policy" statement in the Norris Act. A similar statement (in Wis. L. 1931, Sec. 268.18, c. 376) precedes Wisconsin's statutory strictures on these contracts. A bill, Senate Int. # 138, to withdraw equitable protection from "yellow-dog" contracts, was introduced in the legislature of New York in the last (1933) session. It passed the Senate on Feb. 28, 1933, but got no further.

[3] *Supra*, p. 430, note 1. The texts of the statutes for all of the jurisdictions except New York are to be found in (1932) 35 *Mo. Lab. Rev.* 70-81 (July, 1932) and 544 (Sept. 1932). The New York statute (C. P. A., § 882, as amended 1930) as noted, prohibits *ex parte* orders in all injunction cases, labor or other.

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Greene book. Prior to the legislative sessions of 1933, Wisconsin was the only state which had embodied in legislation the full content of the Norris-LaGuardia Act.[1] Pennsylvania in 1931 enacted laws having the same effect as the Federal legislation so far as it dealt with *ex parte* orders and jury trial in contempt cases.[2]

An active agency in the promotion of legislation restricting the use of labor-dispute injunctions is the Committee on Labor Injunctions of the American Civil Liberties Union. Mr. Nathan Greene, a member of the committee, has drawn up a model state labor-injunction bill for submission to the several legislatures. Except for certain important differences necessitated by constitutional difficulties peculiar to state legislation, the model bill follows substantially the lines of the Norris Act. The committee reports that legislation closely following its model bill has been enacted in the legislative sessions of 1933 in Colorado, Idaho, Minnesota, Utah, Maine,[3] Oregon, Indiana and Wyoming and that the Pennsylvania and California legislatures have enacted bills depriving "yellow-dog" contracts of legal effect.[4] The committee's model bill was introduced this year in the legislatures of 24 states, in 14 of which it was defeated. The supreme courts of Massachusetts and New Hampshire have rendered adverse advisory opinions to the legislatures on anti-injunction bills.[5]

"Three decades of legislative activity" have been worried through and with it all, the authors conclude, "the position of labor before the law has been altered, if at all, imperceptibly".[6]

VIII

The traditional attitude of organized labor toward the use of the injunction has always been one of great hostility. Its strategy for dealing with it was by agitation, lobbying, etc. to achieve the enactment in states and nation of statutes which would change the (substantive and procedural) common law of labor. Until this legis-

[1] Laws of 1931, c. 376, §§ 268.18 to 268.30. Construed to protect picketing and injunction denied in *Tugenberg Co. v. Jewish Bakers' U.*, Circuit Ct., Milwaukee County, cited in *Bull. Int'l Juridical Assn.*, August 1932.

[2] Laws of 1931, Acts Nos. 310 and 311.

[3] Without the "yellow dog" feature.

[4] It should be noted that not all of these most recent enactments are taken account of in the statements in the preceding pages about legislation restricting *ex parte* orders and "yellow dog" contracts.

[5] (1931) 275 Mass. 580, (1933) 166 Atl. 640.

[6] *Op. cit.*, at 197-198.

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lative conquest of the injunction was accomplished, labor's strategy in the face of such injunctions as might be issued against labor unions was one of militant and active resistance, "even to the point of defying enforcement of them by the courts".[1] This official strategy seems now to be watered down to one of disregard and evasion of injunctions. Thus, verbally at least, American labor is as defiant of injunctions as ever it was. But for a decade past, while year by year defiant resolutions were coming out of A. F. of L. conventions, the unofficial strategy actually used by local unions in face of employers' bills of complaint was more cautious and opportunistic. It has varied between disregard and evasion, on the one hand and obedience, pending appeal at least, on the other. Moreover, when disregard is the cue, it is not used until the injunction has been issued. The complaint bill and notice of motion are not disregarded. Attorneys are retained, and labor defends, often incurring heavy financial burdens in doing so. The policy of unions which are unaffiliated with the American Federation is very much the same except for the Communist unions whose official policy of unremitting defiance and mass resistance is earnestly carried out in practice.

It appears then that the American labor movement, as represented by the A. F. of L. and the non-Communist groups which are not affiliated with the Federation, is following two policies respecting the labor injunction: The first is a long-run policy of attempting by statutory enactment (1) so to change the substantive law as to remove from the category of restrainable acts as many as possible of the activities which it deems essential to the existence and growth of trade unionism, (2) to eliminate procedural abuses incident to the use of the injunction, or (3) to bring about the *outright abolition* of the use of the injunction in labor dispute cases. The second policy is a short-run strategy for everyday use pending the achievement of the third objective of the long-run policy; it involves legal defence against employers' suits and if and when injunctions issue, an opportunistic policy regarding them, now one of deliberate disregard or evasion, now one of obedience, depending upon the exigencies of the local situation, the temper of local officials, of the membership of the union, of the employers and their agents, and so forth.

In the light of the fate of the "yellow-dog" statutes, the statutes providing for jury trials in contempt cases and the statutes like the Clayton Act and similar state enactments designed to circumscribe

[1] *Convention Proceedings*, Amer. Fed. of Labor, 1927, p. 296.

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equity jurisdiction in labor dispute cases, it cannot be said that the long-run legislative policy has been successful. The judicial fate of the Norris Act and the state imitations of it in New Jersey and Wisconsin, and of the three or four state laws recently enacted to scotch the *ex parte* order, is of course on the knees of the gods. It is clear that the record so far is one, as Frankfurter and Greene say, "largely of futility". "The result", they add, "justifies an application of a familiar bit of French cynicism: the more things are legislatively changed, the more they remain the same judicially".[1] But despite their clear recognition of the failure of legislative strategy in the past the authors obviously nurse the hope that new efforts will be, if not judge-proof, at any rate less vulnerable to emasculating judicial "interpretation" than were earlier ones. It seems fair to suggest that the future effectiveness of the Norris Act (and such state laws as may follow its pattern) is not so certain as to justify organized labor and its friends in continued reliance upon legislative change alone.

Are there supplementary lines of policy that may be followed? One would seem to be for labor to make one phase of its short-run policy serve its long-run purposes. Since the judiciary, in this country, is the final fixer of the rules, would not labor be well advised to concentrate its efforts upon the judges, doing so systematically from case to case? As noted, its short-run policy (or, at least, its short-run *practice*) is, from case to case, to defend against the bills. This strategy, however, is not systematically developed. Each case is treated largely as an isolated phenomenon. Let the labor movement take a leaf out of the book of the employers whose League for Industrial Rights has unquestionably been instrumental in making the common law doctrines more favorable to employers. Let the Legal Information Bureau of the American Federation of Labor be made over into an active board of legal strategy which shall, through retention of wise and competent lawyers, shape a long-run campaign to modify the common law in ways that shall make it less of a brake upon, and more of an accelerator of, improvement in the economic condition of workers. In the past, in isolated cases (they are few indeed!), thanks to the insight and determination of union officials or labor lawyers in pushing matters through on appeal, the doctrines of the common law in a few jurisdictions have been brought more completely into line with the realities of

[1] *Op. cit.*, at 176.

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industrial relations.[1] If from the cases brought below careful selection were made of those giving greatest promise of such interpretations on appeal as have rewarded labor's sporadic efforts in the Rifkin, Fay and Railway Clerks cases it would seem reasonable to expect in time a change in common law so substantial that statutes like the Clayton and Norris Acts and similar state legislation would no longer be enacted only to be judicially slaughtered.

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[1] *Brotherhood of Railway & S. S. Clks. v. Tex. & N. O. Ry.* 24 Fed. (2nd) 426 (S. D. Tex. 1928); 25 Fed. (2nd) 873; 25 Fed. (2nd) 876; aff'd. 33 Fed. (2nd) 13 (C. C. A. 9th, 1929); aff'd 281 U. S. 550, 50 Sup. Ct. 427 (1930); *Exchange Bakery & Restaurant v. Rifkin, supra*, p. 440, note 3; *J. H. & S. Theatres v. Fay*, (1932) 260 N. Y. 315, 89 *N. Y. L. J.* 29 (N. Y. Ct. of Appeals, decided Nov. 22, 1932).

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REVIEWS

Planned Money. By SIR BASIL P. BLACKETT. New York, D. Appleton & Co., 1933.—viii, 201 pp. $1.50.

The old gods are falling swiftly. *Laissez faire* has long since been condemned; political facts, if not political philosophy, have scrapped democracy in many parts of the world; and now a pillar of British official finance quite calmly throws the gold standard out of the nearest available window. Sir Basil Blackett, in his interesting little volume, gives a very readable if rapid sketch of the defects of the old international gold standard, and in substitution for it outlines a variant of what has come to be known more generally as "managed money". His program is fairly simple, in essence; perhaps too simple. Each country is to have its own independent and inconvertible currency, which the local currency authorities are to manage in such fashion that internal "prices" remain approximately constant; and if all countries do the same thing, then the usual theoretical dilemma over choosing between internal price stability and foreign exchange stability will of course not assume substantial proportions. It is recognized that not all countries may desire to adopt this arrangement immediately, and a transitional stage is envisaged in which there will be two groups of countries, one on the new basis and one still on gold; but universal adherence to the proposed new basis is the ideal.

Sir Basil seems to enjoy an enviable simplicity of conviction that discount rates and open market operations will actually enable the central authorities in each country to keep prices stable, and a remarkable willingness to assume that bank loans and deposits move at least roughly in proportion to currency in circulation; he quite ignores the problems of bank credit *per se*. Nor is he bothered by the fact that price changes are in fact likely to appear too late to be useful guides for central control operations. Perhaps more serious, however, if only because now so widely conceded, are his unquestioning assumptions that it is the gold standard which is the chief root of the world's present difficulties; and (what is implicit, if not

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baldly stated) that under "planned money" these difficulties would hardly have occurred. The latter assumption is in the nature of the case unprovable, but dispassionate minds, if there be any left, may well pause over the first one. Surely it can be argued with equal or greater plausibility that the world fall in prices has been chiefly symptom, not cause; and that a severe and widespread contraction of business activity was well-nigh inevitable after 1929, even though monetary manipulation might have obviated some (it could hardly have obviated all?) of the fall in prices. And there is a final difficulty, which Sir Basil himself recognizes, over trusting so heavily to the wisdom of any central authority at all, rather than relying on the admittedly defective but visible and quasi-automatic guides of the international gold-standard apparatus.

These comments, however, perhaps reflect only the particular bias of the reviewer; certainly the pendulum of practice has now swung the other way. The book is well written, suggestive, and worth the study of any one interested in the subject matter—and that means most of us. It is of course particularly significant because of the high source from which it comes. Yet a final trivial protest may be entered. If quotations at the heads of chapters are essential, as they seem to be in current English writings on finance, then Shakespeare, Milton and Wordsworth are perhaps better suited to the main theme than *Alice;* but might not both types be dispensed with?

JAMES W. ANGELL

Die moderne Nation. By HEINZ O. ZIEGLER. Tübingen, J. C. B. Mohr, 1931.—viii, 308 pp. 14 Rm.

Students of nationalism have usually been either good historians limited in their powers of analysis or good social and political theorists lacking in historical perspective. Only rarely, as in the case of the works of Carlton J. H. Hayes, has the problem of modern nationalism been treated with both brilliant philosophic insight and adequate attention to the general lines of historical development. The work of Heinz Ziegler, a conservative product of the liberal sociological school of Franz Oppenheimer of Frankfurt, is a brilliant sociological and philosophic analysis of contemporary nationalism combined with a penetrating survey of the contributions of political thinkers like Hegel, Ranke, Stahl, Lorenz von Stein, Gneist, Treitschke and Constantin Frantz. It is particularly illuminating in bringing out the position of the nation as an "individual totality,

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an end in itself . . . and the creator of its own world". In his attempts, however, to trace the historical development of this phenomenon, to show how and why the nation, only one of the many forms of social organization, has arrived at this position of supremacy over all other social groups, the author lays himself open to several points of attack.

Dr. Ziegler rejects both the objective (environment, language, race, territory etc.) and the subjective (assertion of national will to live) tests in the definition of a nation. He regards the nation as the "concept which provides the sanction of legitimacy to the power of the state". It is "above all a political and modern manifestation", a "historical category and a specific phenomenon of modern European history". The nation, says Ziegler, is a product of the French Revolution and of Western Europe (as distinguished from Germany). The French Revolution with its emphasis on the general will, on popular sovereignty and popular representation, has brought about the emergence of the nation as the supreme collectivity which alone provides its members with a unity of political action. The representatives are no longer those of estates, social or economic classes, or separate regions. They are the representatives of the "people" and the "people" has become the nation. Dr. Ziegler thus analyzes the modern nation as a purely political manifestation, characteristic primarily of Western nationalism and maintaining its continuity from the French Revolution to the post-war period of Wilson and the self-determination of peoples. Only among the Germans does he find the development of the idea of a *Kulturnation*. The German idea of cultural nationalism exerted some influence on the beginnings of the national movements among the Slavic peoples but it was soon overpowered by the influence of the French model of political nationalism. He fails to see the close inner connection between cultural and political nationalism. He fails to see that all nationalist movements have their origin as cultural manifestations. Only after the development of a strong consciousness of cultural ties within a group does the national movement become political in character. This is true of France as well as of Germany, of England as of Italy, and of the Balkan states as well as of the peoples of the Orient.

A similar lack of historical perspective is revealed in the author's attack on the view that individualism and personal freedom went hand in hand with the movement for national freedom. For him, the sole result of the French Revolution was the establishment of

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a new absolutism, the absolutism of the nation as a successor to the absolutism of the dynasty, and not the realization of the principles of personal freedom and democracy. The modern state, according to Ziegler, was faced with the alternative of either "autonomy of the individual or the sovereignty of the collectivity" and it was the latter that triumphed. As a matter of fact these principles were not considered as alternatives. Both were advocated and they involved no contradiction for the early nationalists. Nationalism was just as much an expression of individualism as was the demand for personal freedom. "The development of nationalism is but the growth of individualism writ large" wrote a recent English writer. And Wilhelm von Humboldt long ago proclaimed the dictum, "As with the individual, so with the entire nation". The close connection between the two is clearly exhibited in Schleiermacher and Herder as it is in the French revolutionaries and in Mazzini. That the connection has, in the course of a century, been lost and that the cultural, libertarian nationalism of the early period has developed into a new form of absolutism and oppression is but another of the ironies of historical development. As Professor Hayes points out in connection with Herder, "Herder, like the gentle dew from Heaven, has fallen upon both the just and unjust. After Francis Lieber there was Treitschke, after J. S. Mill, Homer Lea; after Laveleye, Barrès; after Mazzini, Mussolini. Only the nineteenth century separates Herder from the Great World War of the Nations".

KOPPEL S. PINSON

ENCYCLOPAEDIA OF THE SOCIAL SCIENCES
NEW YORK CITY

The Rise of the City: 1878-1898. By ARTHUR M. SCHLESINGER. New York, The Macmillan Company, 1933.—xvi, 494 pp. $4.00.

The Rise of the City is the tenth volume of the *History of American Life* edited by its author and Dixon Ryan Fox. The editors of this series have as their primary concern the history of the evolution of American society and in the successive volumes that have appeared there has been presented to American scholarship a new picture of national development emphasizing social and cultural change. The work under review, as its title bears witness, discusses a social transformation of major significance, probably the most far-reaching which has been experienced in this environment.

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The change from rural to urban predominance was a gradual process beginning long before 1878 and by no means concluded by 1898, but in these last decades of the century there was a startling acceleration of the urbanizing process. Even the South and the Far West were feeling the penetrating influence of this pervasive force, the Middle West very noticeably succumbed to its dominance, while in the East there was the greatest and most complete ascendency. With the great industrial changes that in large part caused the metamorphosis this book is not concerned, but the other phases of the change are given full consideration.

The most apparent characteristics of the urban advance were the physical growth of the cities and the changes in their appearance. Not only were metropolitan horizons much larger, but new paving, street cars, electric wires, street lights, larger houses, manholes, hydrants, fire alarm and police boxes gave a demonstration of a transformation in ways of living that could not fail to have a profound influence upon American evolution.

The congestion of people brought changes in social habits. The position of women assumed an independence and an individualism which was to be termed "emancipation"; perhaps nothing more significant could occur than a rearrangement of the relation of the sexes. New ideas of social relations developed, a new social consciousness marked by philanthropy and responsibility became more apparent. On the other hand the slum, organized crime, disease and vagrancy were evidences that such new social concepts were needed.

Cultural advance accompanied this change. The great increase of wealth which in part made this possible will be treated in another volume of this series, but the great expansion of aesthetic interest and artistic capability which occurred in the years under consideration furnishes several very encouraging chapters, as do the advance of education and the socialization of religion. On the other hand so much of mass production, both commonplace and ephemeral, was provided for a society easily satisfied with mediocre and standardized products, that much that was encouraging was stifled by the smug and the commonplace.

The transformation has been described with a wealth of detail and a vividness which match the social significance of the event itself. Furthermore there is a breadth of research which has brought to scholarship a greatly enlarged bibliography, presented in a critical essay at the end and in the footnotes, in such profusion as to make

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the book a gold-mine for further writers in the field. Professor Schlesinger, also, has made extensive and painless use of the study of statistics to make more accurate his conclusions. Politics has been subordinated to its relative position among other manifold interests of American society. The economic story of the period has been omitted almost entirely, as it is to be given a volume by itself. It is regrettable that this companion work which is in the process of being written by Miss Ida M. Tarbell could not have appeared simultaneously, as the relation of the economic and the social phases of the period is so close as to suffer from even temporary separation. Another step has been taken in the advance of social history by this description of the "momentous shift of the center of national equilibrium from the countryside to the city."

ROY F. NICHOLS

UNIVERSITY OF PENNSYLVANIA

American Railroads: Four Phases of Their History. By WINTHROP M. DANIELS. Princeton, Princeton University Press, 1932.—120 pp. $1.50.

Written with all the compelling power of beautiful language which characterized his written opinions when a member of the Interstate Commerce Commission, this slender volume by Professor Daniels is both authoritative and a delight to read. The subtitle is slightly misleading since the final one of the book's four chapters ventures into the realm of prediction, but the reader loses nothing thereby. Indeed much economic history is masterfully utilized in the presentation of the conclusions.

In approaching the theme of the first chapter—"The Railroads and Wall Street"—the author gives a brief prefatory account of the historical rôle of the railway in the development of civilization. Commenting upon the physical factors which account for the commercial importance of New York City and the historical background of Wall Street, Professor Daniels then passes to a short review of some of the better known instances of "judicial chicanery, legislative corruption, individual treachery, arrant betrayal of corporate trust, and wholesale looting." Believing, however, that the rôle of Wall Street in railroad finance is better understood by a portrayal of the dominant characteristics of the several periods, the author proceeds to divide the span of approximately 100 years into the interval from 1830 to 1860, which he calls the period of the "In-

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dividual Trader's Market", the period from the Civil War decade until the turn of the century, which he calls the "Era of the Railway Magnate", and the period to date, which is described as the "Era of Banking Control". These three epochs are described in a brief and interesting manner.

Chapter ii outlines the changing rôle which Congress has assumed toward the railroad industry. Like the rôle of Wall Street, the attitude of Congress as it changed from its early indifference is divided into three periods. The first one is depicted as the "Era of Congressional Largesses" and extends from about 1850 to 1887. It was characterized by the favors of Congress as manifested by loans or bond subsidies and land grants, due, according to Professor Daniels, to the industrial and political annexation of the West, the strengthening of the military arm, the betterment of the postal service, and the relaxation of the strict-constructionist doctrine of constitutional law. Following this period and extending until 1920 was the period of Congressional assertion and development of regulation which the author well might have called the Era of Congressional Frowns, characterized as it was by the legislation of 1887, 1903, 1906, 1910 and 1916. Since 1920, as evidenced by the provisions of the Transportation Act, the former commissioner sees a recession of Congress from its earlier antipathy to the carriers. Though the period is still incomplete, the reader is led to believe that this period might be designated easily as the Era of Fostering Guardianship.

In contrast to the orderly progression in the relationship of the carriers to Wall Street and Congress, the author finds no similar development in the relationship of the railroads to the president. Chapter iii forms a very definite contribution to historical knowledge, tracing, as it does, the influence and attitude of the presidents of the United States in respect to the rail carriers. Though Washington died a generation before the first railroad in America, he is included because of his vision of the transportation needs of the future. Other presidents of importance in this respect were Jackson, Lincoln, Hayes, Cleveland, Roosevelt, who was the first holder of the presidency to emerge as a dominating force in the railroad world, and, finally, Wilson. Professor Daniels describes in some detail the work of Roosevelt and Wilson, incidentally relating several heretofore unpublished facts. His view of Wilson's attitude toward the I. C. C. (p. 83) is diametrically opposed to the story that went the rounds of Washington at one time during Wilson's administration.

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He is reported to have said, "The I. C. C. think they are the Supreme Court itself."

Of exceedingly great interest is the final chapter of the book, entitled "The Railroads and the Public", in which the author undertakes to forecast the future relations of the public and carriers under what appears to be the approaching reconstitution of the transport industry. He believes, among other things, that the early antipathy toward the rail carriers will relax due to the internal reforms and the external rehabilitation of the railroad industry in public opinion, that cost of service rather than what the traffic will bear will determine rates, that there will be a coördination of different types of transportation under common control, that there will be no further growth of the railway net, that there will not be complete regulation of the motor truck, and that the railroad will become only a large star in the economic galaxy rather than its central sun. While there will be many dissenters among transportation economists and others to the conclusions set forth in the concluding chapter and elsewhere in the volume, there will be none to controvert the fact that the arguments are ably and forcefully presented.

LESLIE A. BRYAN

SYRACUSE UNIVERSITY

The Theory of Monopolistic Competition. By EDWARD CHAMBERLIN. Cambridge, Harvard University Press, 1933.—x, 213 pp. $2.50.

In many economic texts we are told that most goods are traded under conditions which are a combination of competitive and monopolistic elements. Nevertheless, in theoretical economics the theory of competitive prices has continued to serve as the center of the general analysis of commercial and industrial processes in capitalistic society. The limited appropriateness of competitive price theory has been obscured by the fact that in economic theory competition has usually been regarded as the antithesis of monopoly. As a result of this view it has appeared reasonable to assume that where competition between sellers and between buyers exists the competitive price theory is approximately valid even though elements of monopoly appear. The chief merit of, and indeed the occasion for, Professor Chamberlin's book is that he has refused to avoid difficulties by following this complacent assumption. He has attempted to explain the relationship of the market positions of business enterprises to the price system and to commercial policies. The analysis,

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though it deals with matters which for the most part have been neglected in theoretical economics, is made strictly in accordance with the fundamental method of economic theory. Professor Chamberlin's study, therefore, is highly significant.

The study is divided into two main parts. In the first, the author has analyzed imperfect competition where there are a few, but only a few, sellers of identical goods in the identical market—the problems of duopoly and oligopoly. The second and larger part of the book is an analysis of imperfect competition where the demands for the goods of different sellers are closely related but not identical. It is to the latter situations that the author more particularly applies the term "monopolistic competition", and it is to the analysis of such situations "that special interest and importance attaches". The theory of monopolistic competition is concerned "not only with the problem of an *individual* equilibrium (the ordinary theory of monopoly), but also with that of a *group* equilibrium (the adjustment of economic forces within a group of competing monopolists, ordinarily regarded merely as a group of competitors)" (p. 69). For the analysis of this problem, Professor Chamberlin has developed an analytical technique both distinctive and ingenious.

There appear to the reviewer to be a few mistakes of detail in Professor Chamberlin's exposition. For instance, the marginal receipts curve in Figure I (p. 13) is wrongly located. There also seems to be an error of reasoning, or an unfortunate use of terms, in the attempted distinction between an equilibrium price and a price equating demand and supply (pp. 12-16). Some confusion may arise on account of the fact that "competition" and "monopoly" are sometimes referred to as "forces" rather than as conditions of the market. This use of the terms is difficult to understand since it is shown that the only "force" with which economic analysis is concerned is the same whether the conditions be those of perfect competition or monopoly—that "force" being the motive of individuals to maximize their incomes. Such mistakes are, however, of minor importance to the general argument. On the whole, the details of analysis are worked out with admirable precision of terminology and logic.

In the appraisal of this study and its significance to economic theory, there is one point of major importance to which the reviewer wishes to call attention. It does not appear that the results of the analysis justify the author's contention that monopolistic competition should be differentiated from monopoly in economic theory.

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One may define monopoly in such a way as to exclude the sort of situations with which the study deals. But the propriety of establishing such a distinction depends upon whether or not the theory of monopolistic competition provides anything of importance to the refinement or criticism of economic theory. This distinction has afforded Professor Chamberlin the opportunity for an elaborate analysis. It will be observed, however, that he is able to arrive at precise conclusions regarding prices and market behavior under conditions of monopolistic competition only upon the assumption that the demand curves of the goods sold by different sellers are related in a very simple and unrealistic way. "The argument rested upon the implicit assumption that entrance to the field *in general* and to every portion of it *in particular* was unimpeded. If entry is in any way or degree restricted, the conclusions are different" (p. 111). Now, under conditions of "monopolistic competition", entrance of new enterprises into the "market" of any one producer, and the encroachment of producers already in the *general* field upon one another's "markets", is always restricted. Such restriction is essential to the fact of differentiation of demands for the products of the different producers. When the idealizing assumptions are removed, the author has been unable to arrive at precise general conclusions regarding the relations between prices and market policies (pp. 110-113, 172-176). Moreover, the policies of monopolistic competitors may be based upon considerations to which Professor Chamberlin does not undertake to analyze at all. For instance, such enterprises may undertake to drive competitors from the field by a "price war". Such an enterprise also frequently follows a discriminatory rather than a uniform price policy. When such considerations are kept in mind one must find that the theory of monopolistic competition falls as far short of explaining price adjustments and market behavior in imperfectly competitive markets as do the "partial solutions yielded by the theory of monopoly".

On account of the facts to which attention has just been called, the reviewer is of the opinion that the significance of Professor Chamberlin's study is that it provides an important basis for the criticism of the whole of the accepted economic theory. It does not appear, however, that an analysis which recognizes the prevalence of monopoly (or, if one wishes, monopolistic competition) can establish important general conclusions, regarding prices and commercial relations, other than the simple denial of the accepted doctrines.

L. A. MORRISON

NEW YORK UNIVERSITY

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The Bank for International Settlements at Work. By ELEANOR LANSING DULLES. New York, The Macmillan Company, 1932.—xii, 631 pp. $5.00.

The Bank for International Settlements, though barely three years old, has already been the subject of a number of extended studies. Of these the most recent, at least in English, is Miss Dulles' work, which carries the account through September 1932. The Bank is a new type of financial institution. Created by international action and in virtue of certain international treaties, and with a Swiss charter, it was set up in the first instance to act as an international trustee and clearing house in connection with the Young Plan arrangements for handling the Reparation payments. It was also given latitude, however, to act in much broader capacities. Many people hoped that it would prove to be not only the agency through which a comparatively painless transfer of the Reparation annuities might eventually be made and received, but also an agency through which a new chapter in international financial coöperation might be inaugurated. Only a part of these hopes have been fulfilled. The glittering but uncertain schemes for the development of backward regions through the Bank's instrumentality, and for thereby accomplishing the payment of much of the Reparations charges, have dropped out of sight; and since Lausanne the activities of the Bank in connection with the current administration of Germany's obligation itself have of course become of only minor importance. On the other hand, the Bank has played an invaluable and unexpected part in the rescue operations necessitated by the threatened collapse of certain currencies in the last two years; it has helped in meeting various other emergency situations; and it has been of great service in providing a channel for comunication, and for the coördination of effort.

Miss Dulles gives an extended account of these aspects of the Bank's origins and operations; indeed, almost too extended, for there is a good deal of repetition of material and even of discussion. Her account of the Bank's activities necessarily deals primarily only with those operations which were undertaken publicly. Also of great importance, and perhaps of equal general interest, are those operations which were not undertaken publicly, and which have as yet not become generally known—the shifts of funds from one market to another, their amounts and timings and motivations; those loans to various institutions, which do not appear on the Bank's books in

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such form that they can be distinguished; the reasons for making them; and the like. With these matters Miss Dulles must have developed an extensive acquaintance, though as with all banks there are obvious reasons of policy to prevent their being set out publicly till long after the event. The record of those operations of the Bank which she is able to present, and which are generally known, is in the main admirable, but a full judgment on the Bank cannot be made until the character and results of these other operations, possibly rather less admirable, are also brought to light.

Certain things the Bank definitely could not do, and others it has not in fact attempted. The relatively small size of the assets at its disposal (only about 425 million dollars even at the peak, in May 1931, and hardly half of that now), and the fact that these assets were scattered through many different currencies, has meant that it could not rely on sheer force, on mechanical pressure, to bring about any substantial change in current conditions. It has had to rely chiefly on moral influence, and on the shrewd timing of operations. Its peculiar legal and financial position, and the fact that its unit of account is the Swiss franc at par, have also apparently debarred it to date from "creating" credit to any great extent, though there seems to be no conclusive reason outside of considerations of policy why this situation should persist if a change is desired. If the Bank begins to create credit on a substantial scale, students of banking may then have to deal with the interesting problem of a three-fold multiplication of lending power, instead of merely the present double multiplication. Finally, the Bank has also not had resources adequate to exert much pressure on the foreign exchanges, again except through a skilful timing of relatively small transactions. On the other hand, by providing a duct for coöperation between the various leading banks and money markets, and on occasion by actually inducing such coöperation, its indirect influence and power have frequently been great. This has been especially true with respect to its organization of the international rescue operations already referred to.

Miss Dulles, in her concluding chapters, takes a rather optimistic view of the possibilities for an extension of international financial coöperation in the future, and of the benefits which may accrue therefrom. I hope that she, and those who are of similar mind, will prove to be right. Certain things such coöperation can clearly do. It can render emergency assistance to countries whose currencies, in consequence of some sudden unexpected pressure, are about to be

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forced off a stable base. It can also render assistance, as has already been demonstrated in Austria, Hungary and elsewhere, to countries which are going through protracted periods of reconstruction—provided the countries are not numerous, and the funds required not relatively large. Further, it can undoubtedly reduce certain types of exchange rate fluctuation, at least between those countries which elect to keep a common currency basis such as gold. But that it can reduce the fluctuations of business in general within each country, by helping to correct either general over-expansion or, as now, general over-contraction, seems much less clear. The premise, often unstated, which underlies most favorable views of the possibilities in these directions, is that the central bank within each country shall be both able and willing to exercise reasonably effective control of its own constituent national economy: otherwise the international help is likely to be wasted on thin air. But the present powers of central banks are evidently rather uncertain quantities, varying with the current situation and as yet working chiefly in one direction alone. We need a vastly increased knowledge, both historical and theoretical, of what central banks can and cannot do and of what the factors are which limit the effectiveness of their operations, before substantial reliance can be placed on such coöperation for the solution of international financial problems other than those presented by acute and essentially short-run emergencies.

JAMES W. ANGELL

An Essay on the Nature and Significance of Economic Science. By LIONEL ROBBINS. London, Macmillan and Company, Ltd., 1932.—144 pp. $3.00.

This brilliant book by Professor Robbins, which marks a reaction against empiricism to the discipline of a more strictly logical method arguing from hypothesis, must command the attention of all students of politics as well as of economics. The former will merely require to substitute, throughout much of the argument, the word "politics" for the word "economics". It marks one more stage in the passing out of favor of that exclusively historical and institutionalist approach which becomes impotent of generalization by expending its energies in the collection of uncouth masses of fact. We even here read again a justification of the economic man as "an expository device".

Professor Robbins writes: "Here, then, is the unity of subject of

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Economic Science, the forms assumed by human behaviour in disposing of scarce means". It is not the business of non-economists to advise economists how to define their science. They are, however, entitled to protest against a definition that also would cover political science, and to point out that a student of military strategy could choose it as, word for word, descriptive of the art taught by the followers of Clausewitz. Perhaps Professor Robbins is on safer ground when he limits economics to the disposal of scarce *goods* or speaks of the economic system as "a series of interdependent but conceptually discrete relationships between men and economic goods". To the student of the social sciences, however, the essential point in Professor Robbins' book is his admirably argued case for generalizations that "have assumed the form of scientific laws" and his indication of the approach to the subject appropriate to yield this systematization and then laws, instead of a cloud of moralistic, antiquarian or business observations. "Of course", he adds, "the conceptions of any pure science are necessarily purely formal".

This book has already been the subject of numerous reviews, some so far prejudiced by legal or other institutionalism as to be merely muddle-headed, some incisive and illuminating. The criticism of Professor Cannan, as was to be expected, has been of this latter order. "Economics", writes Professor Robbins, "takes all ends for granted". Professor Cannan argues (with a jocularity indeed that is often the sign of defensiveness) that an economic theory of means yet presumes an economic system and social order to which these means are related. Hence, Professor Cannan argues, the economist must take into account economic ends and whether certain proposed means will make those whom he advises "better off". The ambiguity of this phrase is patent and intentional. The obvious implication is that Professor Cannan holds, as does Mr. Hawtrey, that the spheres of economics and ethics cannot be held distinct.

No one will, of course, deny that in practical activity this is true: no human activity is devoid of ethical significance. The issue is whether there is not a subject matter of economic or political means, resting upon the constants of human nature or upon the logic of certain situations, which is theoretically distinguishable as a discipline from judgments of human values. Although Professor Robbins chooses to stress the second alternative, of "shaking out" the implications of an hypothesis, with its dangers of tautology and formalism (instead, perhaps, of insisting sufficiently upon the nexus between scientific hypothesis and psychological or other constants—"the

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things which psychology studies" and the like—as the basis and given data of his science), he seems to win his case for his distinction between economic science and what we may call economic philosophy. That case is, of course, a fundamental one for the development of any social science properly so-called.

Because it may well be true that a systematic study of ethics and casuistry urgently requires to be made in connection with changes in the social order, it certainly does not follow that it is the business of economists, or even of students of political science, to supply this deficiency, as Professor Cannan appears to suppose. Rather the task is one for the moralists and (as Anton Menger and his successors have insisted) of jurisprudents. On the contrary, Professor Robbins is entirely justified in maintaining that a technical economic argument is seriously damaged when the private moral estimates of economists or politicists are surreptitiously intruded and the probability that these would-be arguments will, for the future, be listened to by plain men, or by politicians of another persuasion in social philosophy, is jeopardized. This book is a courageous, distinguished and fundamental attempt to restate the case for attention to precise method in the field of at least one social science.

GEORGE E. G. CATLIN

CORNELL UNIVERSITY

The Administrative Control of Aliens. By WILLIAM C. VAN VLECK. New York, The Commonwealth Fund, 1932.—ix, 260 pp. $3.00.

Our immigration, exclusion and deportation procedure is treated at length in Professor Van Vleck's book, which deals not merely with deportation of aliens—a subject more fully treated in the valuable recent work of Jane P. Clark and in Reuben Oppenheimer's more critical report published by the Wickersham Commission—but also with the subject of exclusion of immigrants, which has not been adequately treated since Bouve's now antiquated *Exclusion and Expulsion of Aliens* of twenty years ago. Accordingly, his treatment of exclusions ought be particularly important. In the present work, the Dean of the George Washington University Law School has produced less a textbook on the law than a "Study in Administrative Law and Procedure", to quote his subtitle. In aid of his task, he closely followed actual hearings for several weeks at Ellis Island and before the Board of Review in Washington, studied and

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closely analyzed the records of 500 exclusion cases and 500 deportation cases in Washington, and made a careful study of the law. No more important or serious field for study of bureaucratic methods can be found than the United States immigration bureau, in which over 19,000 alleged aliens were deported during the next to the last fiscal year, and which normally handles several hundred thousand applications for admission into the United States annually. Professor Van Vleck's book devotes about 20 pages to a study of the "Growth of Our Immigration Legislation", 10 more to a description of the processes of exclusion and deportation respectively, 50 pages to a study of "The Exclusion Process", 64 to "The Expulsion Process", 60 to a study of "Judicial Review" and 40 to his "Conclusions", including about 5 devoted to "Suggestions" for improvement. In general, despite a very useful analysis of judicial review, Professor Van Vleck has contented himself with testing the correctness of the decisions of inspectors in exclusion cases and their recommendations in expulsion proceedings by the unformulated principles which the lay Board of Review applies in treating these cases. This is obviously an inadequate test, as he himself points out that in construing the phrase "likely to become a public charge", for instance, authoritative U. S. Circuit Court of Appeals decisions in two different circuits are brushed aside in favor of an inconsistent district court decision which sustained exercise of broader bureaucratic powers of exclusion and expulsion, defying our hallowed principle of a "government of laws and not of men". As only an insignificantly small fraction of exclusion cases are appealed, it is in that field that reform is particularly needed, especially since almost all review of exclusions has been thwarted since 1924 by the non-reviewable but arbitrary and often lawless action of consular officials abroad under our quota system. Unfortunately, consular determinations are not analyzed by Professor Van Vleck, though, strangely enough, while evincing an almost excessive sympathy for the victims of deportation proceedings, he places the supposed need of summary action on applications for admission so high as almost wholly to disregard the great injustice daily being perpetrated in this field, even to wives and children of United States citizens and claimants to citizenship. Legislation to accord review of consular refusals of visas (including right to adduce new evidence here), though reported favorably in the last Congress in both Senate and House, is not mentioned among his recommendations. Nor does he mention a much desired return to the system prevailing before the Department

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of Labor was created, pursuant to which important immigration decisions of our courts and of the higher officials were published weekly and then in bound volumes annually, and put in the hands of all appropriate government officials, to restrain bureaucracy, though our author points out that only 4 per cent of the inspectors today are lawyers and only 34 per cent high-school graduates. Though Professor Van Vleck criticizes the frequent issuance of warrants of arrest on telegraphic request (in 213 out of 597 cases he investigated), with enormous resulting deportations under a procedure shifting the burden of proof on the aliens, he fails to condemn the violation of the Constitution resulting from such issuance of "warrants not supported by oath", nor the illegality of the departmental rule which actually authorizes substituting an inspector's oath of office for sworn evidence of the facts. Our author correctly states that "few aliens can afford the luxury" of an appeal or of a lawyer, and his useful work is calculated to call attention to some at least of the grave injustices perpetrated in this field of administration.

MAX J. KOHLER

NEW YORK CITY

Report and Recommendations of the California State Unemployment Commission. Sacramento, State Printing Office, 1933. —810 pp.

During April and May of 1932, an unemployment commission of five members, appointed under a statute of 1931, held public meetings through the state of California. This commission was to investigate "all problems relating to unemployment, with a view to formulating such plans and recommending such legislation as will enable the state to take the proper steps toward the solution of any such problems." In following its instructions the California State Unemployment Commission gathered information and opinions from some two hundred employers, workers, academicians, community workers and other interested persons.[1]

By November, the Commission, aided at various times by a staff of special research workers, presented to the California legislators a document of 810 pages. The *Report* sets forth the elaborate investigation of the problems of national and state unemployment, and recommends a program of relief expenditures of 20 million dollars

[1] See *Abstract of Hearings on Unemployment Before the California State Unemployment Commission, April and May, 1932,* San Francisco, August 1932. 244 pp.

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in the state, the five-day week for state business where possible, as well as the encouragement of work-spreading generally, a scheme for compulsory unemployment reserves and compensation supported by employers and employees, long-range planning for public works, and a State Economic Council "to provide for the continuous study and interpretation of all problems relating to unemployment, production and consumption."

The *Report* is divided into seven parts: I. Summary and Recommendations; II. Unemployment—Its Causes and Effects; III. Unemployment Relief and State Aid; IV. Regularization of Employment; V. Advance Planning of Public Works; VI. Unemployment Insurance and Unemployment Reserves and Compensation; VII. Other Related Problems. Designed to aid legislators in California, the *Report* goes far beyond state boundaries in order to comprehend the implications of the current difficulties, and, in spite of being the work of several collaborators, it has been integrated into a well-rounded study. It stands as an extremely significant collection of materials and recommendations for study and action in the alleviation of unemployment.

The investigators look realistically at unemployment—the human effects of the breadline, community aid and vagrancy. The *Report* exhibits the facts of the economic depression by reference to diminished employment and pay rolls, stringency in agriculture, construction and commerce. Utilizing federal census data, the unemployment survey of the Metropolitan Life Insurance Company and other indices, it indicates that 700,000 or about 28 per cent of California's gainful workers were actually unemployed in June 1932.

Presenting briefly four distinctive phases of unemployment—the permanence of an excessive labor supply, displacement through technological changes, and seasonal and cyclical fluctuations—the *Report* then examines the schemes for community and state relief that are offered in California and suggests desirable standards. It presents the plans as worked out in eight other states and the aid offered through two federal measures, the Emergency Relief Construction Act and the Federal Home Loan Act, and summarizes the main provisions included in the state laws on emergency unemployment relief.

It investigates seasonal and cyclical flunctuations and methods of stabilization of employment. Though criticizing "make work" schemes as insufficient measures, it summarizes the best thinking on the subject of advanced planning and considers problems of financ-

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ing, timing and boards of control to alleviate the hardships of cyclical disturbances. At the same time, it typically provides elaborate data on the extent of the public works programs provided in the state and offers brief plans for further expenditures.

In Part VI about 70 pages are devoted to unemployment insurance, relief and reserve schemes as adopted in Europe, Australasia, Canada and South America, as well as in Wisconsin, and under trade union and company plans in the United States. Then follows a deliberative weighing of the merits and demerits of insurance, reserves and compensation, and, deciding in favor of insurance reserves, the *Report* gives Professor J. P. Chamberlain's opinion that a bill such as that prepared by the American Association for Labor Legislation is a proper extension of the state's police power.

The concluding section of the *Report* considers the inadequacy of the present disorganized array of public and private employment agencies. It recommends a unified scheme of municipal, state and federal offices, and makes a plea for economic planning on a national and state basis to "develop a technique for balance". The Commission and staff have gone far beyond the usual committee reports in their presentation of materials. Clarity of exposition, concise formulation and authoritative documentation make the *Report* valuable for student and man of action alike.

NORMAN LEON GOLD

UNIVERSITY OF CALIFORNIA

Corn and Hog Surplus of the Corn Belt. By ALONZO E. TAYLOR. Stanford University, Food Research Institute, 1932.—xxi, 658 pp. $4.50.

Economists and agriculturists will find in this timely volume substantial food for thought, much that is stimulating and none that is insipid. The subject is the most characteristic feature of American agriculture. The region is the keystone of our national agricultural arch. The masterly treatment, employing statistical method, and technical facility in the diverse sciences of agriculture, physiology, chemistry and economics, combines facile presentation with a searching study of regional agriculture. To the reviewer the greatest significance of the study attaches to its regional, national and world approaches, thereby transcending the work done by state experiment station workers. Its international attack refreshingly supplements the narrowly executed federal publications in the field of regional and national policy studies.

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The distinction made between the economic position of subsistence and cash-crop agriculture is fundamental. The subsistence farmer obtains a minimum profit at minimum risk, the cash-cropper at maximum risk aims to obtain a maximum of profit. Implicit and explicit through the treatment is the query, can the cash-crop farmer combine maximum profit and minimum risk? The fundamental thesis however is that the "corn-hog combination" cannot produce palatable fat so cheaply as can the sun-plant combination. "The vegetable oils have entered the picture" (p. 6). An all-round consideration is given to this jolting of a price level in the international trade account, in extensive agriculture, in mechanization, in competition between animal and vegetable fats and oils, in scale of living, in declining per capita food requirements, in rate of growth of population. Besides, social and political considerations enter into the study.

Following an introduction of 40 pages, the author in a short chapter of 30 pages reviews corn production and disposition in the United States and follows it with a chapter of 55 pages of parallel discussion of the hog factor. Chapter iv (pp. 128-162) considers the export of corn and hogs, exposes the decline of corn exports and of hog exports excepting lard, and raises "the question whether it pays to export lard at little more than the price of live hogs if the export of the higher priced cured products cannot be maintained" (p. 162). A long chapter, 76 pages, is given to intensive consideration of domestic and international factors in prices of corn and hogs, concluded by two pages of summary containing this essence: "With prosperity and purchasing power of currency constant, one may surmise that the determination of three-fourths of the price changes [of hogs] depends on factors of supply, with one-fourth depending on factors of demand" (p. 237).

Chapter vi (100 pages) considers the postwar position of corn growers and hog raisers. The section of greatest interest to the reviewer is pages 274-81, treating of the "Change in the Value of Gold". Three years ago the conclusion expressed that "in the long run, agriculture tends to adjust itself to changes in the value of money, but the short-time experiences are often injurious to the point of disaster" (p. 279) would not have been the consensus of opinion of American agriculturists. In the contrasts between farm and urban incomes (pp. 325-30) the author brings into sharp focus the significance of improved technique and of "technological unemployment", concluding that Corn Belt farmers at present are "only partly employed, judged by outturn per man" (p. 330). Arresting socio-

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economic results are that "children leave the farm, [and] two-thirds of the present number of families . . . can operate the farms" (p. 333).

Thus having done with these basic analyses the author arrives at a dramatic stage of vital importance to nearly five million American farmers. He considers in Part II with heightened vigor "Amelioration of the Consequences of a Surplus of Corn and Hogs". Under the several chapter heads he discusses the equalization fee plan of relief, the export debenture plan, the farm allotment plan and price stabilization. These are termed the "external methods" of farm relief calling for governmental administration. There follows (chapter xii) a discussion of "internal methods". In these final pungent chapters the author exposes the arguments and blandishments of governmental administration of the principal lines of farm business. For long-term positive results all the weight of logic and the drive of the author's practiced pen are on the side of "internal methods of relief, requiring governmental guidance and assistance", amounting to "assisted laissez faire".

This is a fundamental study in national agricultural policy. All students of agriculture are hereby in debt to Director Taylor and the Food Research Institute.

O. S. MORGAN

COLUMBIA UNIVERSITY

America in the Pacific: A Century of Expansion. By FOSTER RHEA DULLES. Boston and New York, Houghton Mifflin Company, 1932.—xiii, 299 pp. $3.50.

This book, the author's third in three years, is a survey of American territorial expansion into the Pacific basin during the nineteenth century. It describes how the United States came to acquire Oregon, California, Alaska, Samoa, Hawaii and the Philippines. A preface, obviously written as an afterthought, projects the story into the twentieth century by making a rather unconvincing attempt to tie up the narrative with recent developments in the Far East. Perhaps the closest parallel to this book is J. W. Foster's *American Diplomacy in the Orient*, a volume published in 1903 and now hopelessly out of step with recent scholarship. The treatment is semi-popular, and although Mr. Dulles has used a few printed documents his chief task has been to skim the cream from an imposing and remarkably complete list of special studies.

In a work of this kind one would expect to find little more than

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an interpreting of known facts, but the author does present several interesting speculations. He suggests that if the Civil War had not come "we might conceivably have anticipated by half a century our advance to the coast of Asia" (p. 62); that in purchasing Alaska we unwittingly prevented the establishment of a Communist base within a few hundred miles of our gates; that Alaska may yet prove of strategic value through the location of naval bases on the Aleutian islands; and that if Congress had held out to the Filipinos in 1898 the promise of independence finally given there would have been no insurrection. He makes much of the point that after the Civil War the two major parties played reversed rôles with respect to expansion: the Democrats, shorn of slavery, becoming the opposition group. He further notes that fear of being forestalled by some other nation was a powerful motivating force in the acquisition of each one of our Pacific outposts.

In general, the book is a trustworthy presentation of the subject matter. A number of debatable statements appear, but they probably are inevitable in a survey that calls for sweeping generalizations and the simplification of complex situations. Occasional slips in fact and date crop out, and the twenty-four pages of appended notes, which are somewhat lacking in the precision of the specialist, frequently suggest haste and only a speaking acquaintance with the authorities used. Illustrative of this point is the reference to the good Nordic Professor R. S. Kuykendall as "a native historian" of Hawaii (p. 169). One is somewhat surprised to find no real explanation of the imperialistic surge of the early nineties, and particularly no mention of the influence of Cleveland or of the closed frontier on this phenomenon. In a volume that deals almost solely with territorial expansion, with only incidental references to trade and commerce, it is curious that there should be a chapter on Perry's opening of Japan. Consistency would seem to require that it be omitted altogether or that some space be given to the pioneering work of Americans elsewhere in the Far East.

The author views this whole drama in the light of an America consciously moving toward the establishment of a Pacific empire. So enthusiastic does he become over this imperialistic interpretation that he ignores or fails to emphasize other factors—economic, religious, political—which in some cases were far more important than those he stresses. His evidence, consisting chiefly of bombastic statements from a sprinkling of men in public life, is to a large extent hand-picked, or, in his own words, "consciously sought out." As a re-

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sult, the unwary reader soon finds himself, together with the author, attributing to the actors in the drama a consciousness of the future that they could not possibly have had. Mr. Dulles has done a service by scraping together the evidence to show that there were a few who glimpsed faintly the nation's destiny; but like most evangelists he has overstated his case.

One has merely to look beyond the interpretation to the facts as presented by the author to appreciate the weakness of his position. We took Oregon and California primarily because we wanted the land, not because we wanted a point of departure for the later conquest of the Philippines. We bought Alaska because there was probably only one man in the United States who could seriously entertain the thought of buying it, and fortunately for Russia that man happened to be secretary of state. In 1897, though showing signs of restiveness, we were content with a protectorate over Samoa and we were obdurately refusing to take Hawaii as a gift. Then came the Spanish War. Dewey was given orders to smash the Spanish fleet. If it had only lain at anchor in the Azores it is quite possible that we should have no important Pacific islands today. But Dewey sank the fleet in Manila Bay. Then we had to take the Hawaiian islands, or thought we did, to succor him. A reinforcing fleet captured Guam on the way out, and we kept the Philippines because triumphant America simply could not lower the flag. The year following, a protectorate over Samoa would not do, so we divided the group with Germany. We did not acquire this non-contiguous empire, then, through absent-mindedness or conscious planning, but as the result of a series of fortuitous events.

Nevertheless, Mr. Dulles has told a straightforward story, and he has told it well. He has the happy faculty of seeing things in the large, and his narrative moves swiftly. In dealing with a subject that lends itself eminently to debunking, he has written with excellent taste and has in general maintained a commendable objectivity. The historian will welcome this volume as a fairly reliable handbook that presents the larger fruits of recent scholarship. The intelligent layman will welcome a colorful and highly readable narrative that tells within attractive compass how the United States came to be a Pacific power.

THOMAS A. BAILEY

STANFORD UNIVERSITY

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BOOK NOTES

Professor Otto Hoetzsch has compressed his views on *La Politique extérieure de l'Allemagne de 1871 à 1914* (Geneva, Librairie Kundig; Berlin, Carl Heymanns Verlag, 1933; 87 pp.) into a small volume of less than a hundred pages, issued under the auspices of the Institut Universitaire de Hautes Études Internationales. The account of the Bismarckian period follows the traditional pattern, but his thoughtful analysis of the period after 1890 is worthy of serious study. By 1909 he sees Germany dangerously and irremediably isolated. Did isolation result from the inept diplomacy of Wilhelmstrasse, or from the operation of forces beyond the control of Germany? This is the question which all students must face; like others, Professor Hoetzsch evades it. On the one hand, he maintains that Holstein and Bülow had no policy—of William II he takes an unusually favorable view. Lack of a coherent policy led Wilhelmstrasse to sacrifice the alliance with Russia in 1890 and the chance of an alliance with England in 1901. So far, then, the isolation of Germany would seem to result from the blunders of Bülow and Holstein. On the other hand, he says that Bismarck's "European" policy was obsolete by 1890. The pressure of economic forces drove Germany to adopt a "world" policy which conflicted with vital interests of England and Russia, and led to the union of these powers against Germany. The naval and colonial policy was the result of the fact that "the population of Germany increased every year by about 800,000 souls"; but while the naval and colonial policy continued, the enmity of England was inevitable. The Bagdad Railway inevitably meant the hostility of both England and Russia. The logical conclusion would seem to be that the irresistible pressure of events compelled actions which must produce a hostile coalition; in that case the wavering course pursued by Holstein and Bülow ceases to merit attention. There is, to be sure, more than a hint that Dr. Hoetzsch believes Germany should have kept out of Turkey and abandoned the alliance with Austria in order to win Russia. Even if that be his view, however, his condemnation of Bülow and Holstein for letting slip what he believes the opportunity to ally with England remains inexplicable.

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Furthermore, how can one reconcile the supposed readiness of England to ally with Germany in 1901 with Dr. Hoetzsch's conviction that immediately thereafter England set up an alliance system "the purpose of which was the encirclement of Germany"? "If it was really the purpose of England to maintain the 'balance of power', she should have ranged herself on the side of Germany." Dr. Hoetzsch would seem, therefore, to have evaded the problem of deciding what really led to German isolation. Despite this fact, it is a remarkable achievement for a scholar to have been able to abstract from the voluminous mass of evidence a simple, direct study of forces and personalities, unobscured by detail or by the hesitation to make positive statements which is induced by familiarity with the complexities of a subject.—R. J. SONTAG, Princeton University.

The epic of Spanish exploration and colonization of the Southwestern United States has been only partially recounted. The latest contribution in this field is *Forgotten Frontiers* by Professor Alfred Barnaby Thomas of the University of Oklahoma (Norman, University of Oklahoma Press, 1932; xvii, 420 pp. $5.00). In this interesting volume the author has collected and translated the pertinent original and unpublished documents from Spanish, Mexican and New Mexican archives relating to the activities of Colonel Juan Bautista de Anza, governor of New Mexico from 1777 to 1787. These documents include a geographical description of New Mexico, diaries, correspondence of colonial officials and other documents, which relate the events of the military expeditions made by the governor to subdue hostile tribes or to open trade routes. They portray the methods employed in dealing with the Indians in war and peace, and in controlling the trade relations with the new subjects of the Crown. It is the story of eighteenth-century colonial activity in the Southwest. An introductory chapter gives the background for the administration of Anza and explains the course of events during his term, thus rounding out the story told by the documents themselves. The illustrations are reproductions of Spanish maps and documents of the period studied. A select bibliography comprises published works and a list of manuscripts consulted for the work. The title-page is unique, being hand-lettered after the manner of eighteenth-century Spanish printing and illustrated by a reproduction of the earliest known drawing of the buffalo. The volume, one of the series entitled "The Civilization of the American Indian", in form and presentation is of excellent character.—ROSCOE R. HILL, Leonia, N. J.

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A recent book which will interest students of American politics and race problems is *Race, Class and Party* (New York, Oxford University Press, 1932; x, 302 pp. $3.75) by Paul Lewinson. It is the best written and annotated history of Negro suffrage and white politics in the south the reviewer has seen. The contents are best indicated by the chapter headings: I. "The Land of Dixie" (to 1860); II. "The Reconstruction Period" (to 1867); III. "The Formation of the Solid South" (1867-1876); IV. "The Agrarian Breach" (1876-1896); V. "Disfranchisement" (1890 to 1898); VI. "Disfranchisement at Work"; VII. "The Negro as a Voter"; VIII. "White Politics in the South"; IX. "Conclusions". In the appendices will be found the returns secured by a questionnaire sent in 1930 to 8,806 colored citizens in southern states, various registration statistics, and a digest of southern election laws of 1930. The author is to be complimented for his scholarly and valuable discussion.—CARL KELSEY, University of Pennsylvania.

Dr. Edward T. Devine brings to his discussion of *Progressive Social Action* (New York, The Macmillan Company, 1933; xiv, 225 pp. $1.75) the perspective of long and varied personal and executive experience and persistent study, and the point of view of professional social work, which he says is neither pessimistic nor optimistic, but melioristic. In addition to his twenty years of experience as executive secretary of the Charity Organization Society of New York City, and fifteen years in the social economics faculty of Columbia University, during a part of which time he was also Director of the New York School of Social Work; in addition to the work of his constructive membership in many committees and associations dealing with child labor, tuberculosis, settlements, coal strikes and church federation, he has also served as emergency executive in many great national disasters caused by flood, fire, earthquake and economic distress. During the World War, he carried the best type of social service America had to give, first to Russia, and then to France. Since the war, upon the lecture platform in all parts of the United States, as director of regional health demonstrations, housing projects and emergency relief; and as chairman of the committee which in 1932 framed the Social Ideals of the Churches for the Federal Council of the Churches of Christ in America, Dr. Devine has continually faced each new day with the momentum of all his past days, and in the light of his melioristic social philosophy. To get the full force of this momentum, and the focus of the light of Dr. Devine's philosophy upon the whole range

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of the perplexing problems of today, the reader of this review should not fail to study *Progressive Social Action* for himself. In every chapter, he will find work cut out for him, not only as an individual and as a member of his small social groups, but as a citizen with definite personal responsibility and initiative for the welfare of all the members of every group of which he himself is a member—industrial, social, religious and political, from neighborhood out through state and nation to the great world itself. This wide range of individual responsibility is suggested by the five Parts of Dr. Devine's book, namely: World Citizenship; Economic Citizenship; Three Persistent Problems—poverty, disease and crime; The Housing Problem; and Social Ideals. The author's conception of world citizenship is briefly summarized in the following sentence: "What distinguishes the world citizen is the cooperative spirit, the desire to do justice to the point of view of others, the substitution of knowledge for prejudice; the acceptance, once and for all, of the idea that our lives are fuller, richer, more complete, if we share in the things which belong also to the lives of other peoples." To develop such world citizens, Dr. Devine leans heavily upon the contagion of example, upon a new social education in the schools, and upon the leadership of organized religion, whose three dominant Western groups—Jews, Catholics and Protestants—he shows at some length to be preaching practically the same economic and social gospel. But even granted we have such "world citizens" in spirit, many readers will be disappointed because Dr. Devine, while listing so many things for them to do, does not present them with more ready-made social, economic and political machinery. Such persons will have to take Dr. Devine as he is. He does not believe that social and economic salvation inheres in mere machinery. He does not believe in panaceas and "isms". He expects citizens of the right feeling, idealism and initiative to be able both to repair old machinery and, if need be, to invent new machinery as each old and new social purpose demands. He declares that "Even the Ten Commandments and the Twelve Tables were the result of experience, not the beginning of the social control of individuals for the common good."—HENRY W. THURSTON, New York School of Social Work.

One of the newcomers in the field of periodical literature is the Greek *Revue des Sciences Économiques et Financières* edited by Xenophon Bolotas and Angélos Angélopoulos. The title page is printed in both Greek and French. The articles are all printed in Greek with a short summary of each at the close in French. The

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first number appeared in 1932. The periodical is in four parts, a series of leading articles, a department of current events, a department of statistics, and a department of book reviews, which covers various countries.—EDWIN R. A. SELIGMAN.

Though it is nowhere stated in this volume, *National Minorities in Europe* (New York, Covici Friede, 1932; 121 pp. $1.50), by Otto Junghann, is merely a translation of a German work which appeared in Berlin (Zentral-Verlag) in 1931. Subsequent developments are not considered. The work aims to describe the problem of minorities from the general philosophical viewpoint, then discusses very briefly the history of national minorities, the minorities law, the actual situation of the minorities in the different states of the European continent, the struggle of national communities for liberty, and concludes with a summary of the ambitions of the minorities. It should be noted that the work presents but one side of the question, that of the minorities, and no attempt has been made to present the question impartially or to explain the position of the majority states. The statistics cited in the volume for each state are very useful; but in almost every case these figures disagree with the official statistics of the countries concerned, which, it is true, may be just as partial (and often are) as those presented by the author. In addition, we are not told whether the figures are based on the use of a language by these minorities, or on their expression of allegiance to a certain nationality, or on their religion (which sometimes becomes identified with nationality). Such questions are of greater importance to the census-taking authorities and the minorities themselves than American observers are usually aware of, and have been subjects of violent discussion, for example, in the last census-taking in Czechoslovakia. The reviewer doubts whether the volume will be found very useful. To those who are uninitiated in the problem, it will seem heavy reading, with its many typically German generalizations; to specialists, it will seem a one-sided presentation of the question. It is, at best, a minor item in the German literature on this subject—most of which is of better quality—not to speak of the works in French, Czechoslovak, Polish and other languages.—JOSEPH S. ROUCEK, Centenary Junior College, Hackettstown, N. J.

The United States Employment Service, by Ruth M. Kellogg (Chicago, University of Chicago Press, 1933; xiv, 192 pp. $1.00), supplies a useful post-mortem record of one phase of the program of rugged individualism upon which, it is to be hoped, we have now as a country turned our back forever. For it is a record of the

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development of the United States Employment Service practically up to the time of the passage of the Roosevelt measure for a reorganized federal employment service. It is an informing study of one of the most crying shames in our economic chaos. Miss Kellogg aptly concludes her study with these words: "Barely half of our forty-eight states are now operating even one public employment office. On the whole, the existing offices are very inadequately financed, staffed, and housed. Politics and the spoils system are controlling factors in far too many cases. As a consequence, standards of performance are low and the statistics supplied are of little significance".—ORDWAY TEAD, New York.

(The following criticism of a review published in the POLITICAL SCIENCE QUARTERLY for June 1933 has been received from Professor Julius Stone.—ED.) "Your reviewer of my *International Guarantees of Minority Rights* has made three misstatements which pass beyond the limits of fair criticism. I am driven to ask your leave to correct them. 1. He makes the categorical assertion that 'more than half the documents cited have been conveniently gathered by the Secretariat of the League of Nations.' The reviewer is referring no doubt to Document C.8.M.5.1931.I, which is a collection of the resolutions and discussions of the Council and Assembly concerning minorities procedure, and is cited on p. 273 of the volume under review. This collection, however, has a very limited scope. It is practically limited to the preliminary procedure dealt with in pp. 16-123 of my study. Further, it does not contain materials relating to the cases that have arisen under the procedure, and the overwhelming majority of citations throughout my study refer to such cases. Moreover, even within its limited scope the collection by the Secretariat can scarcely, with scholarly propriety, be used as a substitute for the original minutes and documents. 2. So much for 'one half' of the citations! Your reviewer next passes to the 'first half' of the book, and states that its ground 'covers problems which have been analyzed, from the same viewpoint, in two publications written in English, which appeared in 1929 and 1931.' The 1929 publication is avowedly by the reviewer himself. This is no place to review the learned reviewer's own work. I do not, however, see how the 16 pages of Chapter IV of his *The Working of the Minorities System under the League of Nations,* which purport to cover the entire minorities procedure, can be said to have exhausted the topics to which I found it necessary to devote some 250 pages. The only relevant article of the reviewer consists of

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extracts from this book published in the *American Journal of International Law* for 1929. The discrepancy in length of treatment is a sufficient negation of the reviewer's assertion. 3. The reference to a publication 'in English in 1931' is even more astonishing. Your reviewer has disclosed to me that this publication, which he fails to specify in his review, was a *Foreign Policy Report* of 1931. I had the privilege of reading and criticizing the report in question before it went to press, particularly the 5 pages devoted to the entire procedure in minorities questions. Without detracting from its value as a convenient summary, I do not see that the author of a serious study on a particular subject has a duty to cite a five-page summary written for the non-specialist. Your reviewer's vague reference to a 'publication' in 1931 is, therefore, calculated to mislead. . . ."—JULIUS STONE, Law School of Harvard University.

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